(14,625.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 154.

THE BELL SILVER AND COPPER MINING COMPANY ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF BUTTE ET AL.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 *Transcript on Appeal from the District Court.*

In the Supreme Court of the Territory of Montana.

THE FIRST NATIONAL BANK OF BUTTE *et al.*
vs.
BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, and MICHAEL MURPHY. } No. 606.

Filed Jan. 3rd, 1888.

R. L. WORD, *Clerk.*

2 In the District Court of the Second Judicial District, Silver Bow County, Montana Territory.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITman, Herman A. Dearbourn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs; Samuel Wells and Richard H. Dana, Executors of the Will of Thomas G. Appleton, Deceased, Plaintiffs,
vs.
BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, and MICHAEL MURPHY, Defendants. } 1515.

"Complaint."

The above-named plaintiffs complain to this hon. court of the above-named defendants, and for cause of action set forth—

First. That the above-named plaintiff, The First National Bank of Butte, is a corporation duly organized and existing under and by virtue of the act of Congress of the United States entitled
3 national banks, and is now engaged in the business of conducting a national bank at Butte City, Montana Territory.

That said Edward Bangs, Samuel Wells, and Richard H. Dana, pl'ffs above named, hold a legal title to an undivided interest in the premises hereinafter named as trustees and are the executors of the will of Thomas G. Appleton, deceased.

That Bell Silver and Copper Mining Company is a corporation organized and existing under and by virtue of the laws of Montana Territory, under an act providing for the formation of corporations for mining and other industrial enterprises.

That plaintiffs became, on the 12th day of October, 1885, the owner- of and ever since have been and are now the owners of and entitled to the possession of the premises hereinafter described, situate in Summit Valley mining district, Silver Bow county, Montana Territory, and bounded and particularly described as follows, to wit: That certain quartz lode mining claim known and called the "Bell lode," containing 13.32 acres of land, more or less, and embracing fourteen hundred and twenty-one (1,421) linear feet of said

"Bell lode," being mineral entry number 555 in the series of mineral entries in the land office at Helena, Montana Territory, and designated by the surveyor general as lot No. 69, embracing a portion of section 7, in township 3 north, of range 7 west, of the principal base or meridian for Montana Territory, said premises being those conveyed by United States patent dated the 30th day of April, A. D. 1881, to William McDermott and Geof-rey Lavell.

That on the said 12th day of October, A. D. 1885, the said defendants, without plaintiffs' consent, entered upon said premises and took possession thereof and now unlawfully and wrongfully and without plaintiffs' consent withhold possession thereof from plaintiffs, to their damage in the sum of one thousand dollars.

That defendants have extracted from said premises a large quantity of silver-bearing ore since said 12th day of October, A. D. 1885, of the value of one thousand dollars, which they have con-
4 verted and appropriated to their own use without plaintiffs' consent; that said rents, issues, and profits of said premises is the value of said ore so taken and converted.

Wherefore plaintiffs ask judgment for the possession of said "Bell lode" and for the one thousand dollars damages and for the rents, issues, and profits of said lode and the value of the ore so taken and converted, amounting to one thousand dollars, and for costs of suit herein expended by them.

For a further and separate cause of action and for equitable relief plaintiffs set forth as above in regard to the parties herein and refer to the same and make the allegations in said above cause of action a part of this.

That on the 12th day of October, A. D. 1885, they were the owners of, ever since have been, and are now the owners of and entitled to the possession of the following-described premises, situate in Summit Valley mining district, Silver Bow county, Montana Territory, to wit, that certain quartz lode known and designated as the "Bell lode," containing 13.32 acres, more or less, and embracing fourteen hundred and twenty-one linear feet of the Bell lode and all other lodes, the top or apex of which lies within the limits of said lode premises, said lode being known as mineral entry number 555 in the series of mineral entries in the land office at Helena, Montana Territory, and designated by the surveyor general of said Territory as lot No. 69, embracing a portion of section 7, in township (3) three north, of range seven (7) west, of the principal base or meridian for said Territory above named, said lode premises being those patented on the 30th day of April, 1881, to William McDermott and Geoffrey Levall as the Bell lode by the United States.

That on the said 12th day of October, 1885, defendants entered upon said lode premises against plaintiffs' will and consent and took possession thereof and now wrongfully and without plaintiffs' consent are withholding possession of said premises from plaintiffs, to their damage in the sum of one thousand dollars.

That defendants are now extracting large quantities of ore from said premises and converting the same to their own use with-
5 out plaintiff's' consent and threaten to continue so to do in the future, greatly to plaintiffs' damage.

That said premises are only valuable for the ores therein contained.

That defendants, each and all of them, are insolvent; that the said Bell Silver and Copper Mining Company have become so involved that it is no longer able to attend to or conduct any business such as it was organized to carry on.

Wherefore plaintiffs pray, in addition to the judgment above asked, that the judge of the above court make an order restraining the defendants and each of them and their employees, attorneys and agents, servants and assigns, from mining or extracting or converting any of the ores in said premises or which belong thereto until the further order of this court above named, and for such other and further relief as may be just in the premises.

(Signed) KNOWLES AND FORBIS,
W. W. DIXON,
Attorneys for Plaintiffs.

Filed April 1st, 1886.

6 In the District Court of the Second Judicial District, Silver Bow County, Montana Territory.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, *et al.*, Plaintiffs,
vs.
BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, MICHAEL MURPHY, Defendants. } 1515.

Separate Answer of Bell Silver and Copper Mining Co.

Now comes the defendant Bell Silver and Copper Mining Company and for its separate answer—and amends its answer, leave of court having been had—to the complaint of plaintiffs herein denies:

First. That the plaintiff- or either of them on the 12th day of October, 1885, or at any time before or since said date became the owners of or entitled to the possession of the property described in plaintiffs' complaint or any part thereof. Defendant denies that plaintiffs or either of them now or ever have been the owners or entitled to the possession of the property described in their complaint or any part thereof. Defendant denies that on the 12th day of October, 1885, or at any time without plaintiffs' consent it entered upon the premises described in plaintiffs' complaint, or that defendants or either of them wrongfully or unlawfully withhold the possession thereof from plaintiffs to their damage in the sum of $1,000 or in any sum whatever. Defendant denies that plaintiffs or either of them have been or will be damaged in the sum of $1,000.00 or in any sum by any act or acts of this defendant.

Defendant denies that it has extracted large or any quantities of silver ore from said premises, or that it was or is of the value of $1,000.00 or any part thereof, but this defendant avers that
7 it caused to be extracted from said mine silver ore of about the value of $300.00 and no more, which it had a good right

to do, and plaintiffs have not been damaged in any sum whatever by any commission of defendant.

Defendant, further answering, alleges that it is now and has been the owner of the premises described in plaintiffs' complaint and in the actual possession thereof and entitled to the same since the month of November, 1882. Wherefore defendant asks judgment for its costs herein and such other relief as to the court may seem fit and equitable.

Second. This defendant for its answer to plaintiffs' further and equitable cause of action herein denies—

That plaintiffs or either of them on the 12th day of October, 1885, or at any time were the owners of or entitled to the possession of the premises described in their complaint or any part thereof.

Defendant denies that it wrongfully on the 12th day of October, 1885, or at any time entered upon the premises described in plaintiffs' complaint or any of it, but avers that it has been peaceably in the quiet and undisturbed possession of said premises since the year 1882 as the owner thereof and entitled to the possession of the same.

Defendant denies that plaintiffs have been damaged in the sum of $1,000.00 or any sum whatever by any act or acts of this defendant.

Defendant denies that it is or has been or was at the commencement of this action extracting large quantities of ore from said premises or any part thereof, but avers that it extracted ore of about the value of $300.00 and there were no net proceeds, it not paying the costs of extraction.

Defendant, further answering, avers that it is now and was for a long time at and before the commencement of this action the owner of — in the actual and entitled to the possession of the premises described in plaintiffs' complaint and every part thereof.

Wherefore defendant asks judgment for its costs.

SHARP AND NAPTON,
Att'y- for Def. Named.

8 TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

James King, being first duly sworn, says that he is the president of the Bell S. & Copper Mining Company; that he has heard read the foregoing answer and knows the contents thereof, and that the facts therein stated are true to his best knowledge, information, and belief.

(Signed) JAMES KING.

Subscribed and sworn to before me this 26th day of February, 1887. Filed March 1st, 1887.

JAMES W. FORBIS,
Notary Public.

9 In the District Court of the Second Judicial District, Silver Bow County, Montana Territory.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, *et al.*, Plaintiffs,
vs.
BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, and MICHAEL MURPHY, Defendants. } 1515.

Separate Answer of Jeremiah C. Kelley et al.

Now comes the defendants and (by leave of court first had and obtained) amend their answer herein, and for their separate answer to the complaint of plaintiffs herein deny:

First. That plaintiffs or either of them have been damaged by any act or acts of these defendants or either of them in any sum whatever, and defendants aver the facts to be that they were for a long time the employees of the Bell Silver and Copper Mining Company, a corporation organized and existing as stated in plaintiffs' complaint, and that said corporation was in the peaceable possession of the Bell mine and property at all dates mentioned in plaintiffs' complaint, and became indebted to plaintiffs for labor upon said mine in a large sum of money, and that for the purpose of paying themselves they were permitted and licensed by said corporation to extract ore from said mine and convert the proceeds thereof to their own use; that they did, in pursuance of such permission and license, extract ore from said mine to about the amount of 100 tons and converted the proceeds thereof to their own use, but it failed to realize the defendants near the amount due them for past labor and services while employed by said corporation as laborers; that the said plaintiffs knew of said acts of defendants and made no objections thereto, but, on the contrary, acquiesced in said acts of defendants and sanctioned the acts of said corporation in employing them as laborers in the first place, and ratified and sanctioned the
10 acts of said corporation in giving them a license and permission to pay what was due them out of the mine, if it was possible so to do. Defendants, further answering, charge on information and belief the facts to be that the defendant The Bell Silver and Copper Mining Company was and now is in the rightful possession of said mine and property described in their (plaintiffs') complaint and acquiesced in and knew of all the acts of said defendant in giving permission to defendants to work said mine and extract ore therefrom, and said plaintiffs never at any time, well knowing that defendants were working upon said mine, made any objections thereto or notified these defendants of any claim or ownership by them of said property or any part of it, and defendants plead said acts of plaintiffs as an estoppel to any claim that plaintiffs may have against them.

Defendants, for answer to plaintiffs' further and equitable cause

of action, aver the facts to be as stated in their answer to plaintiffs' first cause of action. Defendants, having fully answered, ask judgment for their costs herein expended.

SHARP AND NAPTON,
Attorneys for Defendants.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Jeremiah C. Kelly, being first duly sworn, says that he is one of the defendants named in answering in the foregoing answer; that he has heard the same read, and that the facts therein stated are true to his own knowledge.

(Signed) J. C. KELLEY.

Subscribed and sworn to before me this 26th day of February, 1887.

WILLIAM H. DE WITT,
Notary Public.

Filed March 1st, 1887.

11 In the District Court of the Second Judicial District in and for Montana Territory, County of Silver Bow.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, *et al.*, Plaintiffs,
vs.
BELL SILVER AND COPPER MINING COMPANY *et al.*, Defendants. } 1515.

Replication.

Now come the plaintiffs, and for a reply to defendants' amended answer—

And deny that plaintiffs or either of them knew of any agreement between any of the defendants and the said Bell Silver and Copper Mining Company specified in said amended answer, or ever sanctioned any such agreement or the acts of said corporation, the said Bell Company, or ever acquiesced in any such agreement or acts, or ever ratified them, or ever sanctioned, acquiesced in, or ratified the acts of the said Bell Silver and Copper Mining Company in giving said defendants license or permission to pay what was due them out of the mine if it was possible so to do or otherwise.

Plaintiffs deny that the Bell Silver and Copper Mining Company was or now is the rightful owner of said mine and property described in plaintiffs' complaint or any part thereof, or that they acquiesced in or knew of all or any of the acts of said defendant, the said Bell Silver and Copper Mining Company, in giving permission to defendants to work said mine or extract ore therefrom, or that plaintiffs ever at any time knew that they were working on said mine until about the time of bringing this action. Plaintiffs admit that they did not notify defendants of their claim or ownership of said premises in said complaint described, as it was not re-

quired to do so; that its title to said premises was evidenced
12 by a record of the said Silver Bow county, Montana Territory.

Wherefore plaintiffs pray as in their complaint herein.

W. W. DIXON,
KNOWLES AND FORBIS,
Attorneys for Plaintiffs.

TERRITORY OF MONTANA, }
County of Silver Bow, } ss:

Joseph A. Hyde, being first duly sworn, on oath doth depose and say that he has heard read the foregoing reply and knows the contents thereof, and the facts therein stated are true to his best knowledge, information, and belief; that he is the cashier of the First National Bank of Butte.

(Signed) JOSEPH A. HYDE.

Subscribed and sworn to before me this 12th day of March, 1887.

CHARLES S. WARREN,
Notary Public.

Filed March 12th, 1887.

13 THE TERRITORY OF MONTANA, }
County of Silver Bow, } ss:

2nd Judicial District Court.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs and Samuel Wells and Richard H. Dana, Executors of the Will of Thomas G. Appleton, Deceased, Plaintiffs,

vs.

BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, and MICHAEL MURPHY, Defendants.

The following facts are the agreed facts in the case in the nature of a special verdict:

First. On the 25th day of April, 1882, the defendant The Bell Silver and Copper Mining Company was the owner of and then was and ever since has been in the possession of all the premises described in the complaint, the other defendants being at the time of the commencement of this action at work on said premises under a contract with said company. The defendants are entitled to a judgment in their favor unless the following facts entitle the plaintiffs to recover in this action.

14 Second. April 25th, 1882, the defendant company executed and delivered to the said grantees therein named an instrument in writing (which said instrument was duly recorded in the office of the county clerk and recorder of Silver Bow county, Mon-

tana Territory, on the 25th day of April, 1882, and again in the same office June 8th, 1882) in words and figures following—that is to say:

This indenture, made this twenty-fifth day of April, 1882, by and between the Bell Silver and Copper *and* Mining Company a corporation duly organized under and in accordance with the laws of the Territory of Montana, party of the first part, and Samuel Wells and Theadore H. Tyndale, both of Boston, Massachusetts, mortgagees and trustees, parties of the second part, witnesseth:

That whereas the said party of the first part is authorized by the laws aforesaid, by its articles of incorporation and by a vote of its trustees, a duly certified copy of which is hereto annexed, to execute trust mortgages of all its property, real, personal and mixed, to secure the payment of bonds issued by it, and whereas the said party of the first part is about to issue sixty bonds in the sum of one thousand dollars each to secure a loan of sixty thousand dollars, to be made to it: Now therefore said party of the first part, in order to secure the payment of its said bonds thus to be issued and interest thereon and in consideration of the sum of one dollar to it in hand paid by the said party of the second part, at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained and sold, transferred and conveyed and by these presents does grant, bargai*b* and sell, transfer and convey to the said Samuel Wells and Theadore H. Tindale as trustees and unto the survivor of them and to their successors in the trust and assigns all the following-described property, viz:

That certain quartz lode mining claim situate in the Summit Valley mining district, Silver Bow county, Montana Territory, known and called the Bell lode containing 13.32 acres of land more or less and embracing fourteen hundred and twenty-one linear feet of the said Bell lode, being mineral entry number 555 in the series of mineral entries in the land office at Helena, Montana Territory, designated by the surveyor general as lot No. 69, embracing a portion of section 7 in township 3 north of range 7 west of the
15 principal meridian; being the same premises conveyed by United States patents, dated the 30 day of April, A. D. 1881, recorded in volume 58, pages 155 to 161 inclusives in the records of the General Land Office, to William McDermott and Geoffrey Lavell together with all and singular the lodes and veins within the lines of said claim (not excepted on the official plat) with all dips, spurs, mines, minerals, easements, mining fixtures, improvements, privileges and appurtenances thereunto in anywise belonging.

Also that certain lot, piece or parcel of land situate in the said county of Silver Bow, Territory of Montana, and bounded and particularly described as follows: to wit: Being the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) of section number (30) thirty, in township (3) three north (T. 3 N.) of range seven west (R. 7 W.) of principal base and meridian in the Territory of Montana, containing an area of forty (40) acres more or less, together with all the buildings, privileges, franchises and appurtenances to

the same belonging. Also the machinery, implements, tools, utensils, stock, and personal property of whatever name or nature, and wherever situated, belonging to or employed by said party of the first part, but this clause shall not be so construed as to prevent the said company from selling old materials in the ordinary course of the business to be replaced by new, nor to prevent said company from mining, reducing and selling ore from said mine in the ordinary course of business. Meaning and intending hereby to mortgage all the property of said company, real, personal and mixed of whatever name or nature owned by the said party of the first part. To have and to hold the said property and rights and all and singular, the said premises and every part thereof with the appurtenances unto the said Samuel Wells and Theodore H. Tyndale and the survivor of them, their successors in trust, and assigns, but upon the following express trust, that is to say: In case the said Bell Silver and Copper Mining Company shall fail to pay the principal or any part thereof which may fall due upon said bonds, secured and intended to be secured thereby, at any time and place when and where the same may become due and payable according to the tenor and effect thereof and for
16 thirty days thereafter, then and in that case upon the written request of the holders of one-fourth part of said bonds which may be at the time outstanding and unpaid it shall be the duty of the said party of the second part, their successors or assigns to enter upon and take possession of all and singular the premises and property above described and as the attorneys-in-fact or agents of the said party of the first part, by themselves or agents duly constituted, have, hold, use and employ the mine and smelting works and all the premises and property belongings and appurtenances thereunto and proper for their use, and conduct the same business of said mine and smelting works, mining, reducing, smelting and selling ore or its products, and receive the avails thereof and the proceeds of the sales thereof, making from time to time all repairs, alterations and additions thereto and extensions thereof that they may deem needful and after paying for all such repairs, alterations, additions and extensions and all proper working expenses connected with the management and care of said property and premises, including taxes and all expenditures necessary for the preservation of the premises and property, and all right therein and the care and due administration of the trust hereby created relative thereto together with a reasonable compensation for their services in such proceedings and indemnifying themselves against all liability arising from this trust, apply the surplus moneys to the payments *pro rata* first of the interest and then of the principal of all the said bonds, remaining unpaid whether the same shall have matured or not, or, the said party of the second part their successors in said trust and assigns at their discretion may and upon the written request of the holders of one-fourth of said bonds then unpaid shall cause the said premises and property to be sold at public auction in Butte City, Montana, or in the city of Boston, Mass., as the said party of the second part their successors or assigns may deem

best, first giving thirty (30) days' notice of the time and place and terms of sale by publishing the same once a week for three weeks successively in one of the principal newspapers for the time being in Boston, Mass., and Butte City, Montana, and upon such sale to execute to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance in fee-simple for the same which
17 shall be a bar against the said Bell Silver and Copper Mining Company, party of the first part, its successors and assigns and all other persons claiming under it, or them of all right, interest or claim in and to the said premises and property and all parts thereof; and it is expressly agreed that the party of the second part, their successors and assigns or any person or persons in their behalf, may purchase at any sale made as aforesaid or at any sale made by order of court under the laws of Montana, and that no other purchaser shall be answerable for the application of the purchase-money; and the said trustees shall, after deducting from the proceeds of any such sale the costs and expenses thereof and of managing the said property and enough to indemnify and save themselves harmless from and against all liability arising from this trust and their own compensation apply so much of the proceeds of the said premises and property as may be necessary to the payment of the principal and interest of the said bonds unpaid, whether matured or not, and shall restore the residue, if any, to the party of the first part, it being expressly understood and agreed that in no case shall any claim or advantage be taken of any valuation, appraisement, redemption or extension laws by the said party of the first part, its successors or assigns, nor any injunction or stay of proceedings or any process be obtained or applied for by it or them to prevent such entry or sale and conveyance as aforesaid.

It is expressly understood and agreed that in case said party of the second part, their successors in said trust and assigns, shall for any reason omit to avail themselves of any such default as aforesaid, any such omission shall not prejudice or impair the right or remedies of said party of the second part, their successor in said trust or assigns to avail themselves of any further or future neglect or default of said first party, nor shall the above remedies for default exclude the party of the second part from any other legal or equitable remedies in the premises.

And the said party of the first part hereby covenants and agrees to well and truly pay or cause to be paid the said
18 sums of money mentioned in said bonds together with interest thereon; and that in case default shall be made in the payment of the interest or any of the said bonds or any part thereof, at any time and place when and where the same may become due and payable according to the terms, tenor and effect thereof, and for thirty (30) days thereafter, that then and therefrom the principal of such bond or bonds shall forthwith become and be immediately due and payable, so that the lein hereof can be at once enforced, anything herein or in said bonds to the contrary notwithstanding, and that they will pay all taxes, assessments and betterments that may be or become payable in respect to said premises and property, that

said premises and property are free from all incumbrances, that they are lawfully seized in fee-simple of the same and that they have good right to convey the same as aforesaid. And said first party for itself and its successors further covenants and agrees to execute and deliver any further reasonable and necessary conveyance and assignments of said premises and property, or any part thereof, to said party of the second part, their successors in trust or assigns, which council of said second party may at any time advise for the more effectual vesting the title to the premises and property hereby granted or intended to be conveyed in the said party of the second part, their successors and assigns and for more fully carrying into effect the object and purposes of these presents.

It is also mutually agreed and understood that the said party of the first part, its successors and assigns, may dispose of the current income of said mine and property hereby conveyed as it or they may deem proper until default shall be made in the payment of the principal or interest of said bonds issued under and secured by this instrument or any part thereof, and that upon the full and final payment of the principal and interest of said bond the estate hereby granted to said party of the second part shall be void, and the right title to the premises and property hereby conveyed, shall revert to and revest in the said party of the first part, its successors and assigns, without any acknowledgment, satisfaction, reconveyance, re-entry or other act. And it is further agreed that in case it should become the duty of the trustees under the provisions of this indenture to take possession of the mortgaged premises for breach or breaches of condition thereof, they shall not be required to do so until they are indemnified or furnished with the necessary funds for that purpose by one or more of the holders of said bonds, and further that for the conduct or omissions of any counsel employed by them or agents or attorneys employed therein for the purpose aforesaid, said trustee shall not be responsible if the same shall be selected by them in good faith. It is hereby also mutually understood and agreed that said party of the second part, their successors in said trust and assigns shall only be accountable for gross negligence or for wilful default or misconduct in the management thereof, and shall not be responsible for acts or omissions of each other to which they do not severally assent, and that they shall be entitled to reasonable compensation for their labors and services and their necessary traveling expenses in the management of said trust. It is further agreed by and between the parties hereto that if either of said trustees now assuming this trust, or either of their successors, should, at any time during the continuance of this trust, from any cause, become incapable of administering the same, the other trustee, for the time being, shall appoint some suitable person to act as trustee with him and give written notice thereof to the party of the first part, their successors or assigns, and such new trustee or trustees so appointed shall be vested, for the purposes aforesaid, with all rights, interests and powers including the right of survivorship and the power to appoint another trustee as aforesaid, requisite to enable him or them to execute this trust with-

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out any further assurance or conveyance of the same; but this provision shall not in any manner impair or limit the force and validity of any acts done by a single trustee by virtue of his survivorship before such appointment of another trustee shall be made. The said party of the second part does hereby accept the trusts created by these presents.

In witness whereof, the said Bell Silver and Copper Mining Company, party of the first part, has caused its corporate name to be hereunto subscribed, and its corporate seal to be attached by
20 its president and the same to be attested by its secretary both for this purpose authorized by the vote of the board of trustees, a copy of which is hereunto annexed — will appear; and the said party of the second part have also hereunto, each for himself, set their hands and seals.

[CORPORATE SEAL.] BELL SILVER AND COPPER MINING COMPANY,
By C. F. MEADER, *Pres.*
SAMUEL WELLS.
THEADORE H. TYNDALE.

I certify that C. F. Meader, president of the "Bell Silver and Copper Mining Company," signed the foregoing instrument as president of said company on the date therein named, and that the seal affixed thereto is the corporate seal of said company.

J. N. LITTLEHALE, *Secretary.*

Subscribed and sworn to before me this 25th day of April, A. D. 1882.

[NOTARIAL SEAL.] JAMES W. FORBIS,
Notary Public.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

On this 25th day of April, 1882, before me, James W. Forbis, a notary public in and for Montana Territory, came Chas. F. Meader, president of the Bell Silver and Copper Mining Company, to me personally known to be the individual described in and who executed the foregoing instrument of writing and who acknowledged to me that he executed the same as president of the Bell Silver and Copper Mining Company freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

[NOTARIAL SEAL.] JAMES W. FORBIS,
Notary Public.

21 (Endorsed:) Filed for record April 25th, 1882, at 45 minutes past 3 o'clock p. m. A. C. Witter, county recorder, by H. C. Bodley, deputy.

Fourth. Thereafter, on the 24th day of June, 1885, the said Harriet M. Pitman, being then the owner of thirty-five of the bonds

mentioned in the mortgage, which had been due more than thirty days, wrote said Wells and Tyndale a letter as follows and then delivered it to them—that is to say:

"To Samuel Wells and Theodore H. Tyndale, trustees of the trust deed or first-mortgage deed given by the Bell Silver and Copper Mining Company, a corporation duly organized under and in accordance with the laws of the Territory of Montana, of all its property, real and personal, said trust deed being to secure a series of sixty bonds, each bond being for the sum of one thousand dollars, in accordance with the terms of said trust deed, I, Harriet M. Pitman, being the owner of thirty-five (35) of the above-named bonds, do hereby request you to take possession of all property of said Bell Silver and Copper Mining Company or to sell or dispose of the same, as may seem best to you, and from the proceeds to pay the interest on ten of my bonds, which has been due and unpaid for two years and a quarter, and after that to pay the principal of all the bonds, said principal, after being extended for a year, still remaining unpaid and being overdue, including the thirty days of grace. I also hereby agree to furnish, as may be needed, the money necessary for expenses in said action, said money to be repaid from the proceeds of the sale.

(Signed) HARRIET M. PITMAN.

June 24th, 1885."

Fifth. Thereafter, on the 14th day of July, 1885, said bonds being all past due and unpaid, the said Samuel Wells and Theodore H. Tyndale prepared and published a notice of sale in words and figures as follows—that is to say:

Mortgagees' Sale.

Pursuant to the provisions contained in a certain mortgage deed given by the Bell Silver and Copper Mining Company, a corporation duly organized under and in accordance with the laws of
22 the Territory of Montana, to Samuel Wells and Theodore H. Tyndale, mortgagees and trustees for the holders of bonds secured by said mortgage, date- April 25th, 1882, and recorded *with* Silver Bow county, Montana Territory, Record Book "A" of Mortgages, pages 486 to 492, and for breach of conditions of said mortgage deed and for the purpose of foreclosing the same, will be sold at public auction, at the office of Theodore H. Tyndale, 42 Court street, Boston, Mass., on Wednesday, the 2nd day of September, A. D. 1885, at 12 o'clock noon, all and singular the premises and property described in said mortgage deed, viz., that certain quartz lode mining claim situate in Summit Valley mining district, Silver Bow county, Montana Territory, known as and called the Bell lode, containing 13.32 acres of land, more or less, and embracing fourteen hundred and twenty-one (1,421) linear feet of said Bell lode, being mineral entry number 555 in the series of mineral entries in the land office at Helena, Montana Territory, designated by the

surveyor general as lot No. 69, embracing a portion of section 7, township 3 north, of range 7 west, of the principal meridian, being the same premises conveyed by the United States patent dated the 30th day of April, A. D. 1881, recorded in volume 58, pages 155 to 161, inclusive, in the records of the General Land Office, to William McDermott and Geoffrey Lavell, together with all and singular the lode and veins within the lines of said claim (not excepted by the official plat), with all dips, spurs, veins, mineral easements, mining fixtures, improvements, rights, privileges, and appurtenances thereunto in anywise belonging; also the certain lot, pieces, or parcels of lands situated in said county of Silver Bow, Territory of Montana, and bounded and particularly described as follows, to wit, being the (N. E.) northeast quarter (N. E. ¼) of the northeast (N. E. ¼) of section number 30, in township 3 north (T. 3 N.), of range 7 west (R. 7 W.), of principal base meridian of the Territory of Montana, containing an area of forty (40) acres, more or less, together with all the buildings, privileges, franchises, and appurtenances to the same belonging; also all the machinery, implements, fixtures, tools, utensils, stock, and personal property, of whatever name or nature and wherever situated, belonging to or employed
23 by said Bell Silver and Copper Mining Company and conveyed by said mortgage to said mortgagees and trustees.

Said premises and property will be sold subject to all outstanding taxes and assessments, if any unpaid, $5,000 to be in cash at the time of and place of sale, the balance in ten days thereafter upon the delivery of the deed.

SAMUEL WELLS,
THEODORE H. TYNDALE,
Mortgagees and Trustees of said Mortgage, Boston, Mass.

Boston, July 14th, 1885.

Which said notice was published in the weekly issue of the Boston Traveler, July 15th, 22nd, and 29th, 1885, and in the Butte Daily Miner, July 21st, 1885, and from that time daily on week days until August 11th, 1885, inclusive, and in those papers only as above stated and only at the times therein stated.

Sixth. The Boston Traveler is a newspaper published at Boston, in the Commonwealth of Massachusetts, daily and weekly, and is a principal newspaper in said city and of general circulation there and in that vicinity.

Seventh. The Butte Daily Miner is a principal newspaper in Butte, Montana, and of general circulation in that vicinity.

On Wednesday, September 2nd, 1885, the said Samuel Wells and Theodore H. Tyndale offered for sale to the highest bidder the property described in said notice by virtue of their alleged authority in said instrument of date April 25th, 1882, above referred to, described in said instrument, at noon of said day, at the place mentioned in said notice, and at noon of that day they struck the same off to the holders of the bonds in said mortgage mentioned for $45,000.00, forty-five thousand dollars, they then and there being

the highest bidders thereof, by their agent, Francis L. Hayes, and thereupon and thereafter on the 12th day of October, 1885, the said Samuel Wells and Theodore H. Tyndale made and delivered to the plaintiffs, the purchasers at said sale, a deed in words and figures as follows; which deed was duly recorded in the office of the
24 county clerk of said Silver Bow county, Montana Territory:

Whereas the Bell Silver and Copper Mining Company of Butte City, Montana, did by mortgage deed dated April 25th, A. D. 1882, and recorded *with* Silver Bow county, Montana Territory, Deed Book "A" of Mortgages, pages 486 to 492, conveying the property hereinafter described to Samuel Wells and Theodore H. Tyndale, mortgagees and trustees for the holders of bonds secured by said mortgage; and whereas in and by said mortgage deed the grantor therein named, their successors in said trust and assigns, were authorized and empowered, among other things, upon any default in the performance or observance of the conditions of said mortgage, to sell the said premises and property, with all improvements that might be thereon, at public auction, in Butte City, Montana Territory, or in Boston, Massachusetts, first publishing notices as therein required, and to convey the same as by proper deed or deeds to the purchaser or purchasers absolutely and in fee-simple; and whereas default has been made in the payment of the principal of the bonds mentioned in the conditions of said mortgage deed, the said principal not having been paid when it became payable or at any time thereafter paid or tendered to any person authorized to receive the same, and said default having continued for more than thirty days, and said trustees having been requested in writing by the holders of one-fourth of said bonds then outstanding and unpaid to sell all the property described in said mortgage, all as therein provided and pursuant to the provisions of said mortgage deed, we, the undersigned, published on the 15th and 22nd and 29th days of July, 1885, in the Boston Evening Traveler, a newspaper published in said Boston, and on *the* July 23rd, 30th, and August 6th, A. D. 1885, in the Butte Daily Miner, a newspaper published in said Butte, a notice of which the following is a true copy:

Mortgagees' Sale.

Pursuant to the provisions contained in a certain mortgage deed given by the Bell Silver and Copper Mining Company, a corporation duly organized under and in accordance with the laws of the Territory of Montana, to Samuel Wells and Theodore H. Tyndale, mortgagees and trustees for the holders of bonds secured by
25 said mortgage, dated April 25th, 1882, and recorded *with* Silver Bow county, Montana Territory, Record Book "A" of Mortgages, pages 486 to 492, and for breach of condition of said mortgage deed and for the purpose of foreclosing the same will be sold at public auction, at the office of T. H. Tyndale, 42 Court street, Boston, Mass., on Wednesday, 2nd day of September, 1885, at 12 o'clock noon, all and singular the premises and property described in said mortgage deed, viz.: That certain quartz lode mining claim,

situated in Summit Valley mining district, Silver Bow county, Montana Territory, known as and called the Bell lode, containing 13.32 acres of land, more or less, and embracing fourteen hundred and twenty-one linear feet of the said Bell lode, being mineral entry number 555 in the series of mineral entries in the land office at Helena, Montana Territory, designated by the surveyor general as lot No. 69, embracing a portion of section 7, township 3 north, of range 7 west, of the principal meridian, being the same premises conveyed by United States patent dated the 30th day of April, A. D. 1881, recorded in volume 58, pages 155 to 161, inclusive, in the records of the General Land Office, to William McDermott and Geoffrey Lavell, together with all and singular the lode and veins within the lines of said claim (not excepted on the official plat), with all dips, spurs, mines, mineral easements, mining fixtures, improvements, rights, privileges, and appurtenances thereunto in anywise belonging.

Also the certain lot, pieces, and parcels of land situated in said county of Silver Bow, Territory of Montana, and bounded and described as follows, to wit: Being the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) of section numbered 30, in township 3 north (T. 3 N.), of range 7 west (R. 7 W.), of principal base and meridian of the Territory of Montana, containing an area of forty (40) acres, more or less, together with all the buildings, privileges, franchises, and appurtenances to the same belonging; also all the machinery, implements, fixtures, tools, utensils, stock, and personal property, of whatever name or nature or wherever situated, belonging to or employed by said Bell Silver and Copper Mining Company and conveyed by said mortgage to said mortgagees and trustees.

26 Said premises and property will be sold subject to all outstanding taxes and assessments, if any, unpaid; $5,000.00 to be paid in cash at the time and place of sale, the balance in ten days thereafter, upon the delivery of the deed.

SAMUEL WELLS.
THEODORE H. TYNDALE,
Mortgagees and Trustees of said Mortgage,
Boston, Massachusetts.

Boston, July 14th, 1885.

And whereas, pursuant to said notice and at the time and place therein appointed, the said default still continuing, we sold the premises and property conveyed by said mortgage deed, at public auction, by Samuel R. Knights, a duly licensed auctioneer, to the First National Bank of Butte, Harriet M. Pitman, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Herman A. Dearborn, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs; Samuel Wells and Richard H. Dana, executors of the will of Thomas G. Appleton, deceased, for the sum of forty-five thousand dollars, which amount was bid by the said First National Bank of Butte, Pitman, Sewall, Chase, Wyman, Dearborn, Fuller, Hedge, and Bangs, Wells and Dana, and was the highest bid made therefor at said auction:

Now, therefore, know all men that we, the said Samuel Wells and Theodore H. Tyndale, mortgages and trustees as aforesaid, by virtue and in execution of power contained in said mortgage deed as aforesaid and of every other power us hereto enabling, and in consideration of the sum of forty-five thousand — ($45,000.00) to us paid by said First National Bank of Butte, Harriet M. Pitman, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Herman A. Dearborn, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs, Samuel Wells, Richard H. Dana, executors of the will of Thomas G. Appleton, deceased, do hereby grant, bargain, sell, and convey unto the said First National Bank of Butte twenty thousand eight hundred sixty undivided forty-five thousandths, unto the said Harriet M. Pitman six thousand three hundred ninety undivided forty-five thousandths, unto the said Harriet W. Sewall fourteen hun-
27 dred and twenty undivided forty-five thousands, unto the said Arnold B. Chase two thousand and one hundred and thirty undivided forty-five thousandths, unto the said Lillie B. C. Wyman fourteen hundred and twenty undivided forty-five thousandths, unto the said Herman A. Dearborn seven hundred and ten undivided forty-five thousandths, unto the said Ellen M. Fuller seven hundred and ten undivided forty-five thousandths, unto the said Charlotte A. Hedges seven hundred and ten forty-five thousandths, and unto the said Edward Bangs and Samuel Wells and Richard H. Dana, executors aforesaid, ten thousand six hundred fifty forty-five thousandths, all undivided of all and singular the premises and property conveyed by the aforesaid mortgage deed, the said premises and property being described in said deed as follows: That certain quartz lode mining claim situate in Summit Valley mining district, Silver Bow county, Montana Territory, known as and called the "Bell lode," containing 13 32 acres of land, more or less, and embracing fourteen hundred and twenty-one (1,421) linear feet of said Bell lode, being mineral entry number 555 in the series of mineral entries in the land office at Helena, Montana, designated by the surveyor general as lot No. 69, embracing portion of section 7, in township 3 north, of range 7 west, of principal meridian, being the same premises conveyed by the United States patent dated the 30th day of April, A. D. 1881, recorded in volume 58, pages 155 to 161, inclusive, in the records of the General Land Office, to William McDermott and Geoffrey Lavell, together with all and singular the lode and veins within the lines of said claim (not excepted on the official plat), with all dips, spurs, mines, mineral easements, mining fixtures, improvements, rights, privileges, and appurtenances thereunto in anywise belonging; also that certain lot, piece, or parcel of land situate in said county of Silver Bow, Territory of Montana, and bounded and particularly described as follows, to wit, being the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) of section number 30, in township 3 north (T. 3 N.), of range 7 west (R. 7 W.), of principal base and meridian in the Territory of Montana, containing an area of 40 acres, more or less, together with all the buildings, privileges,

franchises, and appurtenances to the same belonging; also
28 all the machinery, implements, fixtures, tools, utensils, stock, and personal property, of whatever name or nature and wherever situated, belong- to or employed by said Bell Silver and Copper Mining Company and conveyed by said mortgage to said mortgagees and trustees. Said premises and property are hereby sold and conveyed subject to all outstanding taxes and assessments, if any unpaid, and this conveyance is made without any warranty expressed or implied on the part of the grantors herein:

To have and to hold the same to the said First National Bank of Butte, Harriet M. Pitman, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Herman A. Dearborn, Ellen M. Fuller, and Charlotte A. Hedges, and Edward Bangs, Samuel Wells, and Richard H. Dana, executors as aforesaid, in their respective proportions above set forth, their heirs, successors, and assigns, to their own use and behoof forever.

In witness whereof we, the said Samuel Wells and Theodore H. Tyndale, mortgagees and trustees as aforesaid, hereunto set our hands this 12th day of October, in the year A. D. 1885.

SAMUEL WELLS,
THEODORE H. TYNDALE,
Mortgagees and Trustees.

Signed in the presence of—
MORRIS DORR.
FRANCIS L. HAYES.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
County of Suffolk, }

On the first day of February, A. D. 1886, personally appeared before me, a notary public in and for said county, Samuel Wells and Theodore H. Tyndale, mortgagees and trustees, personally known to me to be the persons described in and who executed the foregoing instrument, and who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

[NOTARIAL SEAL.]

CHAS. F. BROWN,
Notary Public, Suffolk Co., Mass.

Filed for record April 14th, A. D. 1886, at 5 min's past ten o'clock a. m.

H. S. CLARK,
County Recorder,
By BOOTH, *Deputy.*

29 Ninth. The $45,000.00 was 37½ per cent. of the value of the property so as aforesaid sold.

(The parties not being able to agree as to the value of the property at the time of said sale, as a modification of this agreement, it is agreed that the parties hereto may introduce proof as to its value, and the court may find from said proof the sum which should be inserted in the last fact, and insert the same when it shall stand as

an agreed fact in the case, and such effect shall be given to it as in the judgment of the court it deserves.)

Tenth. If on the foregoing facts and findings the court shall find that the plaintiffs are entitled to recover in this action, judgment shall be rendered for plaintiffs and against defendants for the possession of all the premises described, and costs and nominal damages, and, if the court shall therefore be of the opinion that the defendants are entitled to judgment, such judgment shall be rendered against plaintiffs for costs; but the foregoing facts are subject to any objections by either party as to their materiality and competency and each of them.

KNOWLES AND FORBIS,
Attorneys for Plaintiffs.
NAPTON AND W. F. SANDERS,
Attorneys for Defendants.

This agreement to apply also to Case No. 1542 between the same parties, and 1542 to abide the result of the case.

KNOWLES AND FORBIS,
Attorneys for Plaintiffs.
W. F. SANDERS AND
THOMAS L. NAPTON,
Attorneys for Defendants.

Filed April 5th, 1887.

W. F. SHANLEY, *Clerk*,
By CHARLES S. WARREN,
Deputy Clerk.

30 In the District Court of the Second Judicial District of Montana Territory in and for the County of Silver Bow.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs, Samuel Wells, and Richard H. Dana, Executors of the Will of Thomas G. Appleton, Deceased, Plaintiffs,

vs.

BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, MICHAEL MURPHY, Defendants.

No. 1515.

This action having been heretofore, to wit, at the regular February, 1887, term of said court, tried by the court (a jury trial having been waived by consent of parties in open court, entered upon the minutes) upon the agreed statement of the facts in
31 the case, signed by the parties and hereinafter filed, and the court having, in pursuance of said agreements, found that forty-five thousand dollars ($45,000.00), for which the property described in said agreed statement was sold, was thirty-seven and one-half (37½) per cent. of the value of said property, and that amount

having been inserted in said agreed statement, as therein provided, and the court, after the hearing of said case at said February, 1887, term, taken the same under advisement:

Now, on this 9th day of July, A. D. 1887, at the regular term of said court in open court, the court, having examined the case and being fully advised in the premises, finds for the plaintiffs, and that they are entitled to recover in this action, and thereupon, and in pursuance of stipulation in said agreed statement of facts above mentioned, it is considered and adjudged by the court that the said plaintiffs have and recover of the said defendants, Bell Silver and Copper Mining Company, Jeremiah C. Kelley, and Michael Murphy, the possession of the following-described premises and property, situate in Summit Valley mining district, Silver Bow county, Montana Territory, and bounded and particularly described as follows: That certain quartz lode mining claim known as and called the "Bell" lode, containing 13.32 acres of land, more or less, and embracing fourteen hundred and twenty-one (1,421) linear feet of said "Bell" lode, being mineral entry 555 in the series of mineral entries in the land office at Helena, Montana Territory, and designated by the surveyor general as lot No. 69, embracing a portion of section 7, in township 3 north, of range 7 west, of the principal base and meridian of Montana Territory, said premises being those conveyed by United States patent dated the 30th day of April, A. D. 1881, to William McDermott and Geoffrey Lavell, and every part thereof. It is further considered and adjudged that plaintiffs have and recover of said defendants the sum of one dollar damages, and also their (plaintiffs') costs of this action, taxed at thirty-six $\frac{8}{100}$ dollars.

(Signed) WM. J. GALBRAITH, *Judge.*

July 9th, 1887.

Filed July 9th, 1887.

W. F. SHANLEY, *Clerk,*
By C. V. HENDERSON,
Deputy Clerk.

32 In the District Court of the Second Judicial District of Montana Territory in and for the County of Silver Bow.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs and Samuel Wells and Richard A. Dana, Executors of the Will of Thomas G. Appleton, Deceased, Plaintiffs,
vs.
BELL SILVER AND COPPER MINING COMPANY, JEREMIAH C. KELLEY, and MICHAEL MURPHY, Defendants. } 1515.

Bill of Exceptions No. 1.

Be it remembered that at the July term of the above-entitled court, 1887, this cause having heretofore been argued and submitted

by the attorneys of the respective parties, the court ordered judgment in favor of plaintiffs and against defendants (see Transcript, pages 31 and 32); to which order and judgment the defendants then and there duly excepted for the reason that upon said stipu-
33 lated facts in said case it did not show the plaintiffs were the owners of or entitled to the possession of said property or any part thereof; that no sale had taken place as provided by law under said mortgage; that no foreclosure of the same had been made as provided by the laws of Montana Territory.

Second. That no notice of sale had been given as provided for in the mortgage or trust deed; that said notice was not published for a sufficient length of time as provided in said mortgage or trust deed; that if any sale could have taken place the parties making the sale should have signed the names of their principals by them as attorneys-in-fact; further, that the entire proceedings should have been declared void for the reason that the purchase price of said property was only 37½ per cent. of the actual value of said property at the date of such sale; further, that no sale of the personal property was shown whatever; and generally that on said agreed and stipulated facts, being all the facts in the case, the judgment should be for the defendants.

And this their bill of exceptions is hereby allowed and signed at and before the entry of the judgment herein this 9th day of July, 1887.

(Signed) WM. J. GALBRAITH,
Associate Judge.

Filed July 9th, 1887.

W. F. SHANLEY, *Clerk.*

34 In the District Court of the Second Judicial District, Silver Bow County, Montana Territory.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, *et al.*, Plaintiffs,
vs.
BELL SILVER AND MINING COMPANY, JEREMIAH C. KELLEY, and MICHAEL MURPHY, Defendants. } 1515.

Notice of Appeal.

To Messrs. Knowles & Forbis and W. W. Dixon, attorneys for plaintiffs, and the clerk of the above court:

Take notice that the defendants in the above cause appeal to the supreme court of the Territory of Montana from the judgment therein made and entered in said court on the 9th day of July, A. D. 1887, in favor of the plaintiffs in said action and against the defendants and from the whole thereof.

WILBUR F. SANDERS AND
THOS. L. NAPTON,
Attorneys for Defendants.

Service accepted and copy waived of the above notice of appeal this 24th day of October, A. D. 1887.

W. W. DIXON,
KNOWLES & FORBIS,
Attorneys for Plaintiffs.

Filed Oct. 24th, 1887.

WM. F. SHANLEY, *Clerk*,
By C. V. HENDERSON,
Deputy Clerk.

35 In the District Court of the Second Judicial District, Silver Bow County, Montana Territory.

THE FIRST NATIONAL BANK OF BUTTE *et al.*, Plaintiffs,
vs.
BELL SILVER AND COPPER MINING COMPANY *et al.*, Defendants. } 1515.

Undertaking for Costs and Damages on Appeal.

Whereas the defendants in the above entitled action are about to appeal to the supreme court of Montana Territory from a judgment against them in said action in said district court in favor of the plaintiffs in said action for the possession of certain property therein mentioned and for costs in the sum of $36.80, on the 9th day of July, 1887:

Now, therefore, in consideration of the premises and of said appeal, we, the undersigned, residents and citizens of the Territory of Montana, do hereby jointly and severally undertake and promise, on the part of the defendants and appellants herein, that the said appellants will pay all damages and costs that may be awarded against them on the appeal or on the dismissal thereof not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Witness our hands this 24th day of October, 1887.

(Signed) WILLIAM A. CLARK.
ALEX. J. JOHNSTON.

TERRITORY OF MONTANA, }
County of Silver Bow, } *ss:*

William A. Clark and Alex. J. Johnston, being each duly sworn, says, each for himself, that he is a resident and householder in the county and Territory aforesaid, and is worth the sum of $600.00 in property situated in said county and Territory over and
36 above his just debts and liabilities and exclusive of property exempt by law from execution.

(Signed) WILLIAM A. CLARK.
ALEX J. JOHNSTON.

Subscribed and sworn to before me this 24th day of October, A. D. 1887.

CHARLES S. ELTINGE,
Notary Public.

[NOTARIAL SEAL.]

Filed October 24th, 1887.

W. F. SHANLEY, *Clerk*,
By C. V. HENDERSON, *Deputy Clerk.*

In the District Court of the Second Judicial District of Montana Territory in and for the County of Silver Bow.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

I, Wm. F. Shanley, clerk of the district court of the second judicial district of Montana Territory in and for the county of Silver Bow, do hereby certify that the foregoing is a true and correct copy of all the papers of said action which it purports to be as copied from the original and compared and which comprises the judgment-roll in the case of The First National Bank of Butte *et al.*, plaintiffs, *vs.* Bell Silver and Copper Mining Company *et al.*, defendants, as appears by the records of this office.

In testimony whereof I have hereunto affixed my hand and the seal of said district court, at Butte City, Montana, this — day of ——, 1887.

[District Court Seal.]

W. F. SHANLEY, *Clerk.*

37 *Proceedings in the Supreme Court of Montana.*

JANUARY 12TH, 1888.

Title of Court and Title of Cause.

Arguments of counsel presented and case submitted.

SEPTEMBER 15TH, 1888.

Title of Court, Title of Cause.

This cause came on this day for the judgment and decision of this court on appeal; whereupon, on consideration, it is now here ordered and adjudged by this court that the order and judgment of the court below entered in this cause on the 9th day of July, A. D. 1887, be, and the same is hereby, affirmed with costs.

McConnell, C. J., delivered the opinion of the court, Bach, J., De Wolfe, J., and Liddell, J., concurring.

The opinion is as follows :

38 In the Supreme Court of Montana Territory, July Term, 1888.

THE FIRST NATIONAL BANK OF BUTTE *et al.*, Plaintiffs & Respondents,
vs.
THE BELL SILVER AND COPPER MINING COMPANY *et al.*, Defendants & Appellants.
} No. 606.

Opinion by McConnell, C. J.

Appeal from Silver Bow county.

This was an action of ejectment brought by the plaintiffs against the defendants for the recovery of two mining claims, described in

the complaint. There was judgment for the plaintiffs, and an appeal taken from said judgment to this court. The pleadings make a case of ordinary ejectment. There is no special defense set up in the answer of the defendants. The case was tried by the court without a jury upon certain agreed facts, which have been transferred to the transcript in the nature of a special verdict. The substance of them is that on the twenty-fifth day of April, 1882, the defendant The Bell Silver and Mining Company was the owner of and then was and ever since has been in the possession of all the premises described in the complaint, the other defendants being at the time of the commencement of this action at work on said premises under a contract with said company. The defendants are entitled to a judgment in their favor unless the following facts entitle the plaintiffs to recover, to wit: On the twenty-fifth day of April, 1882, the defendant company executed and delivered to the said grantees therein named an instrument in writing, which was duly recorded, in substance as follows, to wit:

"This indenture, made this twenty-fifth day of April, by and between the Bell Silver and Copper Mining Company, a corporation duly organized under and in accordance with the laws of the Territory of Montana, party of the first part, and Samuel Wells and Theodore H. Tyndale, both of Boston, Massachusetts, mortgagees and trustees, parties of the second part, witnesseth:

"That whereas said party of the first part is authorized by the laws aforesaid, by its articles of incorporation, and by a vote
39 of its trustees, to execute trust mortgages of all its property, real, personal and mixed, to secure the payment of bonds issued by it; and, whereas, the said party of the first part is about to issue sixty bonds, for the sum of one thousand dollars each, to secure a loan of sixty thousand dollars to be made to it—now, therefore, said party of the first part, in order to secure the payment of said bonds thus to be issued, and interest thereon, and in consideration of the sum of one dollar to it in hand paid by the said parties of the second part, at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained and sold, transferred and conveyed, and by these presents does grant, bargain, sell, transfer, and convey to the said Samuel Wells and Theodore H. Tyndale, as trustees, and unto the survivor of them, and to their successors in the trust, and assigns, the following-described property (then follows a description of the property as set out in the complaint), together with all the buildings, privileges, franchises, and appurtenances to the same belonging. * * * But this clause shall not be so construed as to prevent the said company from selling old materials in the ordinary course of the business, to be replaced by new; nor to prevent said company from mining, reducing, and selling ore from said mine, in the ordinary course of business, meaning and intending hereby to mortgage all the property of said company, real, personal, and mixed, of whatever name or nature, owned by the said party of the first part; * * * but upon the following express trusts; that is to say, in case the said Bell Silver and Copper Mining Company shall fail to

pay the principal, or any part thereof, which may fall due on said bonds, secured and intended to be secured thereby, at any time and place when and where the same may become due and payable, according to the tenor and effect thereof, and for thirty days thereafter; then in that case, upon the written request of the holders of one-fourth part of said bonds, and which may be at the time outstanding and unpaid, it shall be the duty of said parties of the second part, their successors or assigns, to enter upon and take possession of all and singular the premises, etc.. or the said parties of the second part, their successors in said trust and assigns, at their discretion, may, and upon the written request of the holders of one-fourth of said bonds then unpaid, shall cause the said premises and property to be sold at public auction in Butte City, Montana, or in the city of Boston, Massachusetts, as the parties of the second part, their successors and assigns, may deem best, first giving thirty days' notice of the time and place and terms of such sale, by publishing the same once a week for three weeks successively, in one of the principal newspapers, for the time being, in Boston, Massachusetts, and Butte City, Montana, and upon such sale to execute to the purchaser or purchasers thereof, good and sufficient deed or deeds of conveyance, in fee-simple for the same, which shall be a bar against the said Bell Silver and Copper Mining Company, party of the first part, its successors and assigns, and all persons claiming under it or them, of all right, interest, or claim in and to the said premises and property, and all parts thereof. And it is expressly agreed, that the parties of the second part, their successors and assigns, or any persons in their behalf, may purchase at any sale made as aforesaid, or at any sale made by order of court, under the laws of Montana, and that no other purchaser shall be answerable for the application of the purchase-money; and the said trustees shall, after deducting from the proceeds of any such sale, the cost and expenses thereof, and of managing the said property, and enough to indemnify and save themselves harmless from and against all liability arising from this trust, and their own compensation, apply so much of the proceeds of the said premises and property as may be necessary to the payment of the principal and interest of the said bonds unpaid, whether matured or not, and restore the residue, if any, to the party of the first part; it being expressly understood and agreed that in no case shall any claim or advantage be taken of any valuation, appraisement, redemption, or extension laws, by the said party of the first part, its successors or assigns; nor any injunction, or stay of proceedings, or any process be obtained or applied for by it or them to prevent such entry or sale, and conveyance as aforesaid."

Then follows a number of agreements, which it is unnecessary for us to notice, and hence we do — encumber this opinion with a copy of them. It is further agreed that thereafter, on the twenty-fourth day of June, 1885, one Harriet M. Pitman, being then the owner of thirty-five of the bonds mentioned in the mortgage, which had been due more than thirty days, wrote said Wells and Tyndale

a letter, directing them, in their discretion, to proceed and sell said premises upon the terms described in the aforesaid instrument; and, further, that thereafter, on the fourteenth day of July, 1885, said bonds all being past due and unpaid, the said Samuel Wells and Theodore H. Tyndale prepared and published a notice of sale, the substance of which, as to time, we will give in another portion of this opinion; that said notice was published in the Boston Traveler and in the Butte Miner; that said papers were newspapers of general circulation in the cities and vicinities respectively where they were published; that, in pursuance of said notice, on September 2, 1885, said Samuel Wells and Theodore H. Tyndale offered for sale to the highest bidder the property described in said notice, by virtue of their alleged authority in said instrument of date April 25, 1882, when the same was struck off to the holders of the bonds in said mortgage mentioned for the sum of forty-five thousand
42 dollars, they then and there being the highest and best bidders; and thereafter, on the twelfth day of October, 1885, the said Samuel Wells and Theodore H. Tyndale made and delivered to the plaintiffs, the purchasers at said sale, a deed of the premises described in the complaint. This deed is the foundation of the action of ejectment brought by the plaintiffs against the defendants for the recovery of said premises. The defendants insist that it is void and conveyed no title to the plaintiffs, for the reasons that (1) the notice of sale was not in conformity with the requirements of the contract; (2) the description of the property sold was insufficient in law; (3) the power or authority under which the mortgagees and trustees, Wells and Tyndale, executed the deed was void under section 371, page 160, of the Compiled Statutes of Montana.

We shall notice these objections in the reverse order of their statement above, for the reason that the last objection is the main one relied upon for a reversal of this case, and involves a question, not only of interest to the parties litigant in this case, but to the business public generally of this Territory. Said section 371 is as follows, to wit: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale." It is contended that the effect of this statute is to so completely modify the common law on the subject of mortgages of real property that the mortgagor cannot convey the title to the mortgagee or to third parties as trustees so as to enable them, under the power thus given by the mortgagor, to sell the real property so conveyed and cut off his equity of redemption, and
43 that therefore all the power and authority which the aforesaid instrument purports to confer upon Wells and Tyndale as mortgagees and trustees to sell the said premises and make the deed aforesaid to the purchaser is void, and hence the deed itself is a nullity, and therefore the whole cause of action which rests upon it on the part of the plaintiffs must fail. This statute was taken from the California practice act of 1851, section 260, and was construed by the supreme court of that State long before its adoption by the legislature of this Territory. In the case of McMillan *v.* Richards,

9 Cal., 365, that court, in commenting upon the statute under consideration, says:

"This section takes from the instrument its common-law character and restricts it to the purposes of security. It does not, it is true, in terms change the estate at law of the mortgagor and mortgagee, but, by disabling the owner from entering for condition broken and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine upon the consideration of which the section was evidently drawn. An instrument which confers no right of either present or future possession possesses little of the character of a conveyance, and can hardly be deemed to pass any estate in the land." And again, in Koch *v.* Briggs, 14 Cal., 265, that court says: "The deed in question not being a mortgage, the provisions of the two hundred and sixtieth section of the practice act can have no application." This was a case in which Briggs was indebted to Koch by promissory note, and to secure the payment of it executed to one Swift as trustee a deed of trust, containing the usual provisions for a sale upon default of payment and for the application of a sufficient amount of the proceeds to pay the debt secured and cost of sale, and the residue, if any, to the grantor. The court, holding
44 this instrument to be a deed of trust and not a mortgage, decided, as just stated, said section 260 had no application. The case of Fogarty *v.* Sawyer, 17 Cal., 589, was an action of ejectment, in which the defendant relied upon a deed executed by one Zimmerman under a power of sale contained in a mortgage made by one Markwert to him, and the contention was, as in this case, that the deed was void under said section 260. The court, after quoting the statute in question, says: "Under the section the mortgage creates a mere lien for the purposes of security and, as in other cases of lien upon real property, can only be enforced by judicial proceedings, except by the authority of the owner of the property. By virtue of the mortgage alone the mortgagee can neither acquire the possession nor dispose of the premises, but the existence of the mortgage does not prevent the owner from making an independent contract for the possession or from authorizing a sale of the premises, the mortgagee consenting thereto, to pay off the debt. Nor is it perceived that there is any legal obstacle to making such contract with the mortgagee or to clothing him with the power of sale. If the owner of the property sees fit to enter into such an arrangement with him or to confer such power upon him it would be going a great way for the court, for that reason alone, to invalidate the proceedings. The right to dispose, both of the possession and estate, follows necessarily from the ownership of the property, and, this being so, no valid objection can be urged against incorporating the contract and power in the same instrument with the mortgage. They do not become in that way any part of the mortgage, but are as much independent of it as though contained in separate instruments. Some stress is placed by the respondents upon the use
45 of the words 'whatever its terms' in the statute. This language is supposed to prohibit separate stipulations between

the parties for the possession and for the sale of the premises upon default. We do not thus construe the language, but, on the contrary, are clear that it was only intended to control the terms of grant, bargain, and sale generally employed in mortgages. * * * We are of opinion that there is nothing in the law of mortgages in this State which prevents the mortgagor from investing the mortgagee with a power to sell the premises upon default in the payment of the debt secured, and when the sale is conducted in accordance with the conditions of the power and is fairly made a good title will pass to the purchaser upon its consummation by conveyance" (see also Grant *v.* Burr, 54 Cal., 298; Bateman *v.* Burr, 57 Cal., 480; Durkin *v.* Burr, 60 Cal., 360). The Supreme Court of the United States in the case of Metropolitan Railroad Co. *v.* Moore, 121 U. S., 158, lays down the rule that where one legislature adopts a statute in the same words, or substantially so, from another State in which the courts have given such a statute a particular construction, that it is adopted with such construction and the courts of the State so adopting it are bound by it. Congress, in framing a new judicial system for the District of Columbia, adopted, in nearly the same words, the law of New York, which at the time had been construed by the highest court of said State. The supreme court of the District of Columbia had rejected this construction and followed the old practice in said District, it being a question of practice, but the Supreme Court of the United States reversed it, and in doing so used the following language, to wit: "Instead of construing these new statutory provisions in the light of the jurisprudence of Maryland
46 previously prevailing in the District in reference to this subject, we think that when Congress reorganized the judicial system of the District by abolishing the old courts and by establishing the present supreme court of the District, with its general and special terms, and adopted them from the legislation of New York in substantially the same language, these provisions are to be construed in the sense in which they were understood at the time in that system from which they were taken. In other words, we think that Congress adopted for this purpose the law of New York, as it was understood in New York." Judge Cooley, in his work on Constitutional Law, page 64, lays down the same rule, as follows, to wit: "And when a particular statute or clause of the Constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction has been put upon it in such last-mentioned State, it is but just to regard the construction as having been adopted as well as the words, and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case." He sustains this view by the decisions of the courts of Massachusetts, New York, Illinois, Indiana, Mississippi, Michigan, Iowa, Wisconsin, Maine, Kansas, Nevada, and Virginia; but he adds: "It does not necessarily follow that the prior decision, construing the law, must be inflexibly followed, since the circumstances in the State adopting it may be so different as to require a different construction." It seems to be the rule, then, that the courts of the State of its adoption are bound by the construc-

tion of the statute given by the courts of the State where it was enacted, unless the circumstances of the people of the State so adopting it are so different as to require a different rule.

47 Certainly, where the courts of a State have gradually developed a particular construction of a statute and such construction has been of a number of years' standing, when the legislature of the other State or Territory adopts it it must be proof quite conclusive of the legislative intent in so adopting it, and only circumstances of a very cogent nature would justify the courts in saying such was not the intention of the legislature.

We might rest this branch of the case here, especially in view of the decision of the Supreme Court of the United States in the case of Metropolitan Railroad Co. *v.* Moore, *supra*, to which court this case is directly appealable, but we have been urged with great zeal by counsel for appellants to ignore the California decisions and put the construction of our statute upon more advanced grounds; and it is also insisted that those decisions are not in harmony with the decisions of the Supreme Court of the United States. For these reasons we will examine the foundations of these decisions and see whether they are sound and worthy to be followed. In order to arrive at a correct interpretation of the meaning of the legislature in passing an act, it is a familiar principle that the status at the time of the law to be affected must be looked to. It is to be borne in mind that at common law a mortgage was a conditional sale; that the title passed by the mortgage deed to the mortgagee, and upon the happening of the condition the sale became absolute, and the deed gave a right of entry and would support an action of ejectment; that courts of equity in process of time, looking to the spirit and intent of the parties rather than to the letter and form of their contract, came to treat a mortgage as a security for a debt, and held that the mortgagor should, even after for-

48 feiture, be permitted to redeem his land by paying the debt secured, with interest; that to remove this equity of redemption which courts of chancery had by innovation ingrafted upon the law of mortgages as it existed in the ancient common law mortgagees resorted to the practice of filing bills in chancery calling upon the mortgagor to redeem his property or be forever closed or barred from asserting such rights, and upon his failure to do so by a day named his right to redeem was by decree foreclosed and the title made absolute in the mortgagee; that this strict foreclosure, as it is called, has, under the liberalizing influences of equity, almost entirely given way to the foreclosure by sale, in which the property mortgaged is regarded as a pledge or security for the debt merely, and a sale is decreed after condition broken and the proceeds applied to pay the debt and cost of sale, and the remainder, if any, paid over to the mortgagor; that the cupidity of creditors, in order to defeat the equity of redemption, led them to make provisions in the mortgage deeds themselves by which the mortgagor waived his equity of redemption; that the courts of chancery held such provisions void as against public policy, and held that "once a mortgage always a mortgage," and that the equity of redemption

was irrevocable and that the mortgagor could not denude himself of this right in the contract of mortgage, and if he subsequently parted with this right for an additional consideration such contract would be closely scrutinized. Hence the right to foreclose after forfeiture and the right to redeem became mutual, reciprocal, and inseparable in a mortgage, and is made the test by some authorities by which the character of the instrument is determined, whether it is a mortgage or not; that courts of law yielded a reluctant,
49 partial assent to these doctrines of equity, but up to the time of the adoption of said section 260 by the State of California, in July, 1851, had continued to hold in that State that notwithstanding the mortgage was a security for a debt and that the mortgagor was the owner of the property as to all the world except the mortgagee, still the mortgagee must be regarded as the owner so far as it might become necessary to protect his rights as such; that this included the right to enter upon the possession of the mortgaged premises and to receive the rents and profits and apply them to the payment of his debt. Such is briefly the history of the law from ancient times and its status at the time of the passage of the statute under consideration. The words commonly used in mortgages are those of bargain, sale, and conveyance, used in absolute deeds, and in themselves purport to convey the title, and were subject to all the consequences at law of such conveyances, including the right to the possession, and it was to repeal this branch of the common law and to "dig up by the roots" the last vestige of distinction between mortgages at law and in equity that the act in question was passed. Hence it lays hold of the very words of bargain and sale and declares that the mortgage shall not be deemed a conveyance, "whatever its terms," so as to enable the owner of the mortgage to recover possession without foreclosure and sale. It declares a distinct public policy that the mortgagee shall not recover the possession of the mortgaged real property, except he becomes a purchaser at or after a foreclosure sale. It reduces the mortgage, for all purposes, to the rank of a mere security, by way of pledge or lien, for the payment of the debt or performance of the duty or obligation under-
50 taken, and thus consummates what equity had been struggling to accomplish for a long series of years. It follows that the provision in the deed in this case by which the mortgagees and trustees were authorized to enter upon the possession of the premises conveyed was void; but no question arises out of this provision, as they did not enter into possession or demand possession until after sale under the provisions of the deed.

But we are met with the contention that the power of sale contained in said deed is void under the provisions of our legislative act, and that the words "foreclosure and sale" mean a sale under a judicial decree, and that a sale under a power created by a contract between the parties is not such a "foreclosure and sale" as is contemplated by the statute. This position is attempted to be met in part by asserting that the deed in question is not a mortgage, but a deed of trust, and our statute contained in said section 371 does not apply to it, as held in the case of Koch *v.* Briggs, *supra*. While the

exact boundary between mortgages with powers of sale and deeds of trust are not very clearly defined, we think the deed in question should be classed with the former. It is a security for a debt; it provides that the mortgagor shall continue in possession and in extracting and selling ores, etc., and declares that the meaning and intent is to mortgage the property, and one of the mortgagees and trustees is the owner of part of the bonds secured, and therefore a creditor; but from the view we take of it we do not think it important to determine to which class it technically belongs. Mr. Perry, in his work on Trusts (vol. 2, p. 155, § 602*d*), says: "Mortgages containing powers of sale and deeds of trust to secure a debt due to a creditor are substantially the same thing at law and equity. At law both kinds of deeds purport to con-
51 vey the legal title to the grantee or creditor or trustee, but in equity the land, the title, and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt The mortgagor in both cases has an estate in the land called an 'equity of redemption.' If he fails to pay the debt his equity of redemption is barred upon due proceedings had, but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken it becomes absolute and he is entitled to a reconveyance or a discharge of the mortgage, as the case may be. In some circumstances a discharge of the mortgage upon payment or a reconveyance is not material, as by the terms of the mortgage and by the law it becomes null and void. A mortgage is a pledge or a security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage deed in form or a mortgage with a power of sale or a deed in trust or a deed absolute on its face, accompanied by an agreement in writing to reconvey or to sell or to do any other thing upon the payment of a certain sum of money. Courts of equity look upon it as a mortgage and deal with it as such."

Inasmuch, then, as it is a mortgage with a power of sale, is such power of sale void? We think not; and we think a mortgage may be foreclosed by a sale under such power.

Bouvier defines a foreclosure to be a "proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever." This was the meaning of the word as used in the ancient law of strict foreclosure, and when the sale under decree took its place and a time was fixed for redemption (usually six months) it was also called a "foreclosure," for the right to redeem was equally barred or closed forever; but the term has a wider meaning still in our law of mortgages. Perry,
52 in his work on Trusts (vol. 2, p. 185, § 602*gg*), says:

"These powers of sale in mortgage deeds do not change their character as mortgages, but the powers of sale are superadded to mortgages. It is a cumulative power of foreclosure, and if the mortgagee does not choose to exercise the power he may foreclose the mortgage by any of the other methods provided by law."

Again, in Jones on Mortgages (vol. 2, § 1773), it is laid down that "generally a power of sale does not affect the right to foreclose in

equity either by a strict foreclosure or by a judicial sale or to foreclose in any way provided by statute for the ordinary foreclosure of mortgages, as by entry and possession or by suit at law. The power is merely a cumulative remedy. It is one species of foreclosure, but it does not exclude jurisdiction in equity. The option, however, to proceed in equity lies wholly with the mortgagee. A resort to a court of equity is not necessary except where made so by statute. It can be effectually exercised without the aid of the courts. Even after the filing of a bill in equity to foreclose such a mortgage and while the bill is pending a sale may be made under the power." (See also 2 Jones on Mortgages, § 953; Blackwell *v.* Barnett, 52 Tex., 333.) Chancellor Kent says: "The sale under a power, if regularly and fairly made according to the direction of the statute, is a final and conclusive bar to the equity of redemption." The effect of a sale under a power is to cut off the equity of redemption, but this does not make the power a contract against the right to redeem after condition broken and thus to violate fundamental principles in regard to mortgages, but such right exists until a sale is made either by decree of court or under the power of sale.

Mr. Washburn, in his work on Real Property (vol. 2, p. 80),
53 says: "The insertion of a power of sale in a mortgage deed does not change it or affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, as it may be, foreclosed in the ordinary manner; * * * but when the sale has been made the interest of the mortgagor is wholly divested, including his equity of redemption." Again he says: "The terms of the deed fix the rights of the grantor as to redemption of the estate as well as the rights and duties of the trustee in doing what answers to a foreclosure of the same by a sale of the premises." But we need not multiply instances in which the word "foreclosure" is used to denote a sale of the mortgaged property under a power of sale and that it is a foreclosure because it as effectually bars the equity of redemption as a decree in chancery. We know of no authority to the contrary. But it is urged that our statute arrests the effect of the words of conveyance so that they pass no title, and there is no interest in the mortgagee to which such power of sale can attach; in other words, that the effect of the statute is to prevent the title from passing to the grantee, and hence there can be no power to sell conferred upon him or a third person, and any effort to do so is void. It will be observed that the statute does not in express terms repeal the common law in this respect. It only says that it shall not be deemed a conveyance in such sense as to entitle the mortgagee to possession without foreclosure and sale. It does not prohibit the mortgagor from conveying the title for the purposes of a foreclosure by sale upon condition broken. The power being no part of the mortgage, but a separate contract, looking
54 to a foreclosure and sale, if there is a default, may, so far as we can see, vest the title in the mortgagee for this purpose. There is nothing in the statute that forbids it; but the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the

power of sale and so couple it with an interest in the land that it becomes a part of the security and irrevocable. In the case of Calloway *v.* Bank, 54 Ga., 441, Judge McCay, in speaking for the court, says: "Neither this court nor the code has said that the mortgagee has no interest. The language is it passes no title. * * * It must be noticed that our code does not negative any limitation or right which the parties may put in a mortgage. It simply defines what a mortgage is and says a mortgage, to wit, a contract, containing the terms specified conveys no title. It does not say that the parties may not add to these terms other terms; that they may not stipulate who shall have the possession and how the pledge may be enforced. The truth is nothing more was intended, as we have said, than to declare that in this State a simple mortgage was not a title on condition as it was held in the English common-law courts, but that it was what the English chancery court held it to be, a security, a pledge for the payment of money or other liability, what, indeed, it in fact is, even in England, since the mortgagor may always make it this by appeal to the chancery court. * * *

Nor is there anything to prevent a power of sale—that is, more than a mortgage—and does not come within the definition. We see nothing in the code to limit the power of contracting as is contended for. Men have a right to do with their own as they will, and the law ought not to be construed to limit that right unless it be very plain. *Consensus facit legem* is one of the most
55 ancient and universal maxims of the law, since it is not the object of society to limit men in the disposition they see fit to make of their own property unless some decided public good is to be attained." Thus we see that under the code in Georgia no title passed by a mortgage, but still it was held in the above able opinion that a valid power of sale may be made.

As there is nothing in our statute prohibiting the execution of a power of sale, what principle of public policy does it contravene? We do not know of any. Mr. Jones, in his work on Mortgages, section 1764, says: "The delay and expense incident to a foreclosure and sale in equity have brought power of sale, mortgages, and trust deeds into general favor, both in England and America, and although their general use is now confined to a part only of our States the same influences which have already led to their adoption and use heretofore are likely to lead to their general use everywhere at an early day. * * * A power of sale, whether vested in the creditor himself or in a trustee, affords a prompt and effectual security. Although it may press harder upon the debtor, in point of time, it is not without its advantages to him. The delay and expense incident to a foreclosure suit he is obliged to pay for in some way, and it is generally in the way of paying a higher rate of interest for the loan." In commenting upon this same subject the supreme court of Mississippi says: "The evil of the former mode of mortgaging is that the mortgagee in proceeding to the recovery of his money is liable to be delayed for an indefinite term in chancery. The new mode is framed with a view to a settlement

out of court. The principal objection in this mode of security to a mortgagor is that in one or two months he may be bereft
of his property, perhaps an endeared residence, without
56 ample opportunity being given for the disposal of it to the
best advantage. * * * But it is believed that, on a candid view of the circumstances, the justice of the case will be found nearly equal. The mortgagor must raise money. Now, if he cannot borrow, he must sell. To save the pain of a sale, which rarely coincides with the wants and views of the seller, he allays his necessities by a loan. How, then, at a future period can he complain of the hardship of a sale, when he has had the interval to make his bargain in, and when, be it observed, he receives the product of the sale after payment of the debt and costs? Under this view of the subject, it is conceived that there is really nothing harsh or unjust towards the mortgagor in this mode of mortgaging with powers of sale vested in a trustee; and it is believed that the guiding principle in reviewing transactions of this nature should be rather to afford facilities for the accomplishment of the intention of the parties than to oppose or obstruct that intention by dilatory precautions and impediments." We think, then, that in upholding mortgages with powers of sale we are laying the foundations of a wise public policy. In a new country, full of great natural resources and requiring large capital to develop them, every facility allowed parties by their own contracts to collect money loaned on mortgages without the delays, often vexatious, of a resort to courts certainly will have a tendency to lower the rate of interest and make money more readily obtainable. It will also have tendency to make real estate a collateral and, as such, available for the purpose of securing loans as well as stocks and bonds. We think the California construction of our statute the correct one. There is nothing in the
decision of the Supreme Court of the United States that is
57 inconsistent with the foregoing views. We are referred to
the case of Teal *v.* Walker, 111 U. S., 242. This case was an action to recover rents and profits accruing while the mortgagor was in possession. The deed stipulated that upon notice the mortgagee should have possession; but, the mortgagor refusing, the mortgagee foreclosed in court and then sued for the rents and profits. The court held that the Oregon statute, which is substantially the same as ours, created a public policy in relation to possession, and that such stipulation was void, and that recovery could not be had if there was no such provision of the statute, for the mortgagor in possession holds as owner and not as receiver for the mortgagee. There is nothing in this case that touches the case at bar. If the mortgagees and trustees had undertaken to enter into the possession of the premises without foreclosure and sale, then this case would have been directly in point. The case of Shillaber *v.* Robinson, 97 U. S., 75, is an authority which sustains our views in holding that the deed in this case is a mortgage with a power of sale, and that it may be either foreclosed under the power or by decree of court. Justice Miller, through whom the opinion of the court was rendered, says: "If there is a power of sale, whether

in the creditor or in some third person, to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred or by suit in chancery." The contention in that case was that, if the deed was a mortgage, the requisite notice had not been given as required by law in its foreclosure and sale. The case of Peugh *v.* Davis, 96 U. S., 337, contains nothing inconsistent with the views herein expressed. In that
58 case Justice Field, who delivered the opinion of the court, held, as we have done, that the equity of redemption is inseparably connected with a mortgage; that it cannot be waived in the same instrument that creates the mortgage, etc.; but the question did not arise nor was it discussed as to the validity of a power of sale and its efficacy as a mode of foreclosure. The only thing decided in the case of Fee *v.* Swingly, 6 Mont., 596, was that the parties to a mortgage might make a contract after the mortgage had been made by which the mortgagee might go into possession and take the rents and profits and apply them to the payment of his debt. This in no way affects the question in this case, in which there has been a foreclosure and sale, and the plaintiffs seek to recover the possession as purchasers at the foreclosure sale. Indeed, we know of no authority where there is no statute regulating the matter which holds that a power of sale in a mortgage is void, unless it be that Judge Brewer is right in the case of Wheeler *v.* Sexton, 34 Fed. Rep., 154, decided in the circuit court of Nebraska March, 1888, in which he holds that the supreme court of that State has held powers of sale in mortgages invalid, for the reason that such court, in a number of cases scattered through several years, has given utterance to dicta to that effect, and he held such a power invalid, for the reason that he was bound by the decisions of the State court.

2. It is insisted by the appellants that the description contained in the notice of sale is not sufficient. By reference to the transcript we find that said description was an exact copy of the description of the property contained in the mortgage, and whatever may be said as to its sufficiency in regard to the personal property
59 it certainly cannot be contended that it does not describe the real property with great particularity; and, inasmuch as this controversy, which is an action of ejectment, is in regard to the realty, we do not think there is anything in this objection. Besides, the description in the notice as to the personalty is as full as in the mortgage.

3. The appellants further contend that the notice of sale was not given by the mortagees and trustees, as required by the power of sale. It provides for notice in the following language, to wit: "First giving thirty days' notice of the time and place and terms of such sale by publishing the same once a week for three weeks successively in one of the principal newspapers for the time being in Boston, Massachusetts, and Butte City, Montana."

The agreed facts show that the notice was published on the fif-

teenth, twenty-second, and twenty-ninth days of July, 1885, in the Boston Traveler and the Butte Daily Miner on the twenty-first day of July and each succeeding day to and including the eleventh day of August, 1885, and the sale took place on the second day of the following September. There is no controversy but that the publication in the "Boston Traveler" was sufficient, as the last publication was thirty days before the day of sale, but the last publication in the "Daily Miner" being on the eleventh day of August and the sale on the second day of September only twenty-two days intervened between the last publication and the day of sale, and it is contended that it was not a compliance with the requirements of the power of sale. We think it was. We do not think the position of the appellants is tenable. It proceeds upon the idea that there is no notice until all three of the publications had been made,
60 and that then and only then there is notice. But certainly the first publication is notice as much as the second or last. If there had been no length of time specified and the requirement had been that there should he first given thirty days' notice of the time and place of sale, then the notice should have been published each succeeding week for and including the fifth week in order to give the requisite thirty days' notice, as was held in the case of Leffler *v.* Armstrong, 4 Iowa, 482.

The giving of thirty days' notice of the time and place of sale would have been accomplished by publishing the notice thirty days before the day of sale and keeping the publication alive during that period; but in the mortgage in this case a provision is made for the length of time that the notice shall be kept alive, to wit, for three weeks, by repeating the first publication the second and third weeks successively thereafter. The very language of the provision is: "First giving thirty days' notice by publishing the same once a week for three weeks successively," etc. The only force and effect of the latter provision is to define the extent of the notice by directing the number of times that it should be published. It does not require that the whole publication shall be completed thirty days before the day of sale. The requirement is that notice shall be given thirty days before, and inasmuch as the first publication is notice, then the requirement is met if thirty days intervene between the time of the first publication and the day of sale. The case of Bussey *v.* Leavitt, 12 Me., 378, is not in point. In that case, under the statute of Maine, a notice was required to be published for three weeks successively. By a subsequent amendatory act
61 it was provided that the three weeks' publication required by the previous act must be "so" published three months prior to the day of sale. While it was correctly held that the publication must be completed three months before the day of sale under that statute, it manifestly appears that that was the meaning of the statute by the use of the word "so," referring to the publications for three weeks.

We find, then, after a careful consideration of all the questions

raised in this case, that there was no error, and the case must be affirmed.

W. W. McCONNELL,
Chief Justice.
THOS. C. BACH,
Asso. Justice.
S. DE WOLFE,
Asso. Justice.
M. J. LIDDELL,
Asso. Justice.

(Endorsed:) Filed Sept. 15th, 1888. R. L. Word, clerk.

62 A.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory, before you or some of you, being the highest court of law or equity in said Territory in which a decision could be had in said suit, in a cause between The First National Bank of Butte, Harriet M. Pitman, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs, Samuel Wells, and Richard A. Dana, executors of the will of Thomas G. Appleton, deceased, plaintiffs and appellees, and Bell Silver & Copper Mining Company, Jeremiah C. Kelley, and Michael Murphy, defendants and appellants, a manifest error had happened, to the great damage of the Bell Silver and Copper Company, Jeremiah C. Kelley, and Michael Murphy, defendants and appellants, as by their complaint appears, we, being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, *that* if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and ac-
63 cording to the laws and customs of the United States should be done.

B.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of September,

in the year of our Lord one thousand eight hundred and eighty-nine.

R. L. WORD,
Clerk of the Supreme Court of Montana Territory.

Filed September 12th, 1889.

R. L. WORD, *Clerk.*

64 C.

Endorsed as follows: First National Bank of Butte *et al*, respondents, *vs.* Bell Silver & Copper Mining Co. *et al.*, app. Filed Nov. 5th, '89. R. L. Word, clerk.

65 D.

Petition for Appeal.

In the Supreme Court of the Territory of Montana.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs, Samuel Wells, and Richard A. Dana, Executors of the Will of Thomas G. Appleton, Deceased, Appellees,

vs.

BELL SILVER & COPPER MINING COMPANY, JEREMIAH C. KELLY, and MICHAEL MURPHY, Appellants.

Petition for appeal to the Honorable Henry N. Blake, chief justice of Montana Territory.

The defendants and appellants in the above-entitled action respectfully show—

That this is an action in ejectment for the recovery of two mining claims; that the above-named appellees and appellants agreed to certain facts which represented the dispute between them, and made said facts of record in the district court of the second judicial district in and for Montana Territory, held in the county of Silver Bow, and upon said agreed statement of facts the said dispute was submitted to the said district court, who, upon the 9th day of July, A. D. 1887, rendered judgment therein against said appellants and in favor of said appellees.

That said cause was submitted to said court without the intervention of a jury, and that the said defendants duly appealed from said judgment in said district court to the supreme court in and for the Territory of Montana.

66 E.

That the said appeal was taken on the 24th day of October, A. D. 1887.

That at a term of the supreme court of the Territory of Mon-

tana begun on the 9th day of July, A. D. 1888, the judgment in said district court was affirmed by said supreme court of the Territory of Montana, and that said judgment of said supreme court was the final judgment in said cause in the courts of Montana Territory, and was rendered September 15th, 1888.

And these petitioners represent and affirm that the amount in controversy herein, wherein final judgment has been rendered, is more than five thousand dollars ($5,000), to wit, is fifty thousand dollars ($50,000), exclusive of costs and interest.

Your petitioners further state that manifest error hath happened to the great damage *to* your petitioners because of the rendition of said final judgment.

Therefore these appellants and defendants appeal from the whole of said final judgment of the said supreme court of Montana Territory, and respectfully pray that the said final judgment of the said supreme court of Montana Territory, the agreed statement of facts, and all the proceedings and papers in said cause may be sent to the Supreme Court of the United States as provided by law, and that a citation issue accordingly.

Your petitioners now here present to your honor a good and sufficient bond in the sum of five hundred dollars ($500), in accordance with the rules of the Supreme Court of the United States in such cause provided, conditioned as therein provided, and ask that said bond be approved.

SANDERS, CULLEN & SANDERS,
Att'ys for Petitioners.

Appeal allowed this Sept. 12, 1889.
HENRY N. BLAKE,
Chief Justice.

67 F.

Endorsed as follows: Petition for appeal. Filed Sep. 14, '89. R. L. Word, clerk.

68 G.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Butte, Harriet M. Pitman, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs, Samuel Weils, and Richard H. Dana, executors of the will of Thomas G. Appleton, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States Supreme Court, wherein Bell Silver & Copper Mining Company, Jeremiah C. Kelly, and Michael Murphy are plaintiffs and you are defendants in error, to

show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speed- justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 12th day of September, A. D. 1889.

R. L. WORD,

[SEAL.] *Clerk Supreme Court of Montana Territory.*

69 H.

THE UNITED STATES, }
District of Montana. }

I do hereby certify that I received this writ September 13th, 1889 and served the same by delivering a copy thereof and reading this writ to W. W. Dixon, attorney for said plaintiffs and appellees, and on the First National Bank of Butte by reading this same to Andrew J. Davis, Jr., the cashier thereof, and by delivering to him a copy of the same and showing him this citation with the seal thereof, and by also showing said attorney for the said appellee- this writ with the seal thereof.

All at Butte City this 13th day of September, 1889.

GEORGE W. IRVIN,
United States Marshal for the District of Montana,
By FRANK B. THOMAS,
Deputy U. S. Marshal.

70 I.

Endorsed as follows: First Nat'l Bank of Butte *et al.*, resp., *vs.* Bell Sil. & Copper M. Co. *et al.*, app. Filed Nov. 5th, '89. R. L. Word, clerk.

71 J.

Citation.

By the Honorable Henry N. Blake, chief justice of the supreme court of the Territory of Montana, to the First National Bank of Butte, Harriet M. Pitman, Herman A. Dearbourn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Baugs, Samuel Wells, and Richard A. Dana, executors of the will of Thomas G. Appleton, deceased.

Whereas Bell Silver and Copper Mining Company, Jeremiah C. Kelley, and Michael Murphy have lately appealed to the Supreme Court of the United States from a final judgment, lately rendered in the supreme court of the Territory of Montana, made in favor of you, the said First National Bank of Butte *et al.*, and have filed the security required by law:

You are, therefore, hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the second

Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Helena, Montana Territory, this eleventh day of September, A. D. 1889.

HENRY N. BLAKE,
Chief Justice.

72 K.

THE UNITED STATES, }
District of Montana, } ss:

I do hereby certify that I received the within writ on September 13th, 1889, and served the same by delivering a copy thereof and reading this writ to W. W. Dixon, attorney for said plaintiffs and appellees, and on the First National Bank of Butte by reading the same to Andrew J. Davis, Jr., the cashier thereof, and by delivering to him a copy of the same and showing him this citation, and by also showing said attorney for said appellees this writ.

All at Butte City this 13th day of September, 1889.

GEORGE W. IRVIN,
United States Marshal for the District of Montana,
By FRANK B. THOMAS,
Deputy U. S. Marshal.

Filed September 12th, 1889.

R. L. WORD, *Clerk.*

73 L.

Endorsed as follows: First National Bank of Butte *et al.*, resp., *vs.* Bell Sil. & Copper Co. *et al.*, app. Filed Nov. 5th, '89. R. L. Word, clerk.

74 M.

Affidavit of Value.

Territory of Montana, in the Supreme Court.

THE FIRST NATIONAL BANK OF BUTTE *et al.*, Plaintiffs, }
vs.
THE BELL SILVER & COPPER MINING COMPANY *et al.*, Defendants. }

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } ss:

James King, a witness of lawful age, being first duly sworn, on his oath says he is the president of the defendant The Bell Silver & Copper Mining Company, and is the agent in this behalf of the said defendants in said action; that the amount involved in said action and the value thereof, exclusive of cost and interest, is more than five thousand dollars ($5,000), to wit, is fifty thousand dollars ($50,000); and further saith not.

JAMES KING.

Subscribed and sworn to before me this 10th day of September, A. D. 1889.

JAMES U. SANDERS,
[SEAL.] *Notary Public.*

75 N.

Endorsed as follows: Affidavit. Filed Sep. 12th, '89. R. L. Word, clerk.

76 O.

Bond on Appeal.

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF BUTTE, HARRIET M. PITMAN, Herman A. Dearborn, Ellen M. Falls, Harriet W. Sewall, Arnold B. Chase, Lillie B. C. Wyman, Ellen M. Fuller, Charlotte A. Hedges, and Edward Bangs and Samuel Wells and Richard H. Dana, Executors of the Will of Thomas G. Appleton, Deceased, Plaintiffs and Appellees,

vs.

BELL SILVER & COPPER MINING COMPANY, JEREMIAH C. KELLY, and MICHAEL MURPHY, Defendants and Appellants.

Know all men by these presents that we, Bernhardt Loeb and C. J. Kinna, of city of Helena, county of Lewis & Clarke, Territory of Montana, are held and firmly bound unto the above-named plaintiffs and appellees in the sum of five hundred dollars, to be paid to the said plaintiffs and appellees in the above-entitled action, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 12 day of September, A. D. 1889.

Whereas the above-named defendants and appellants in the above-entitled action have prosecuted a writ of error and have taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the
77 supreme court of the Territory of Montana:

P.

Now, therefore, the condition of this obligation is such that if the above-named defendants and appellants shall prosecute said writ of error or appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BERNHARDT LOEB. [SEAL.]
C. J. KINNA. [SEAL.]

Sealed and delivered in presence of—
J. U. SANDERS.

Undertaking approved this 12th day of September, 1889.

HENRY N. BLAKE,
Chief Justice.

78 Q.

Endorsed as follows: Bond on appeal. Filed Sep. 14th, '89. R. L. Word, clerk.

79 STATE OF MONTANA, }
County of Lewis & Clarke, } *ss:*

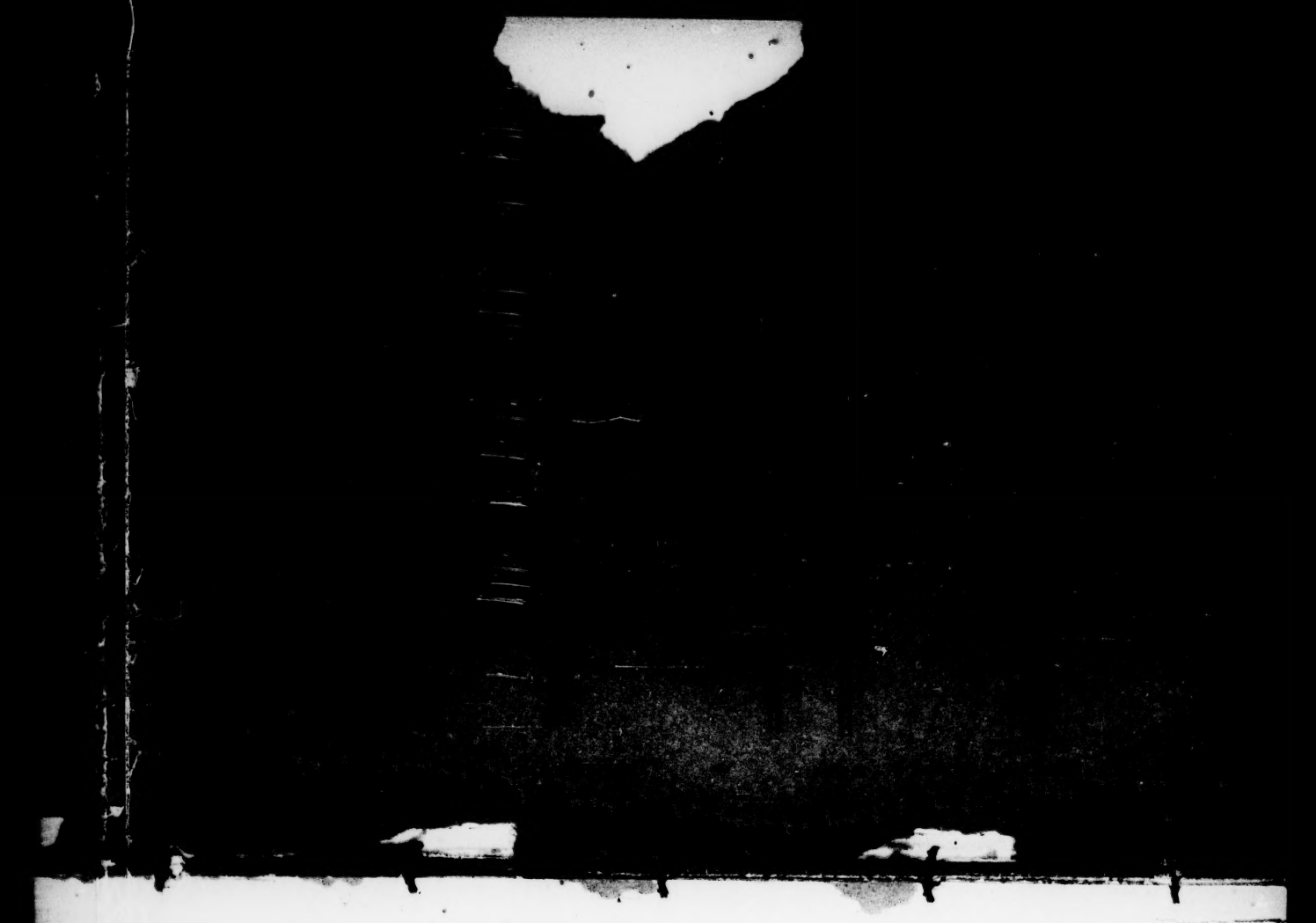
I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that the foregoing seventy-eight (78) pages, numbered and characterized from A to R, inclusive, and from 1 to sixty, inclusive, contain full, true, and correct copies of all records and papers in the case wherein The First National Bank of Butte *et al.* are plaintiffs and respondents and The Bell Silver and Copper Mining Co. *et al.* are defendants and appellants, the originals of which are now of record and on file in my office.

Given under my hand and the seal of the supreme court of the State of Montana this 27th day of April, A. D. 1891.

[Seal Supreme Court, State of Montana.]

W. J. KENNEDY.
Clerk of the Supreme Court of the State of Montana.

Endorsed on cover: Case No. 14,625. Montana Territory supreme court. No. 154. The Bell Silver & Copper Mining Company *et al.*, plaintiffs in error and appellants, *vs.* The First National Bank of Butte *et al.* Filed May 4, 1891.



Supreme Court of the United States.

OCTOBER TERM, 1894.

THE BELL SILVER AND COPPER MINING CO. *et al.*,
Plaintiffs in Error and Appellants,

vs.

THE FIRST NATIONAL BANK OF BUTTE *et al.*

Brief for Appellants.

This is an appeal from a judgment of the Supreme Court of Montana Territory. The case came to the Territorial Supreme Court upon an appeal from a judgment rendered in the district court of the second judicial district of the Territory of Montana (Rec., 7–12) on an agreed statement of facts in the nature of a special verdict, against the appellants, and the same was carried by appellants to the Supreme Court of Montana Territory, and it was there affirmed, and from that affirmance this appeal is taken. (Rec., 37 *et seq.*)

On a mortgage containing a power of sale, dated April 25, 1882, to secure $60,000 and interest due the appellees, the mortgagees, Samuel Wells and Theodore H. Tyndall, September 2, 1885, at Boston, Massachusetts, sold the property to the appellees for $45,000, which was 37½ per cent. of its then value, and on the 12th day of September, 1885 (in their own names), made to appellees a deed, which is the basis of their suit, being an action to recover the premises in the nature of an action of ejectment, and

the question is, whether their action conforms to the law of the *lex rei sitæ*, the law which controls sales of real estate.

United States *v.* Fox (94 U. S., 315);
Bronson *v.* Kinzie (1 How., 311);
Rorer Ints. Law (2d Ed.), 285.

This seems to be a suit containing the elements of an action at law, and a complaint in equity, and this practice is recognized in the Montana Territorial Code.

Hornbuckle *v.* Toombs (18 Wall., 648);
Davis *v.* Billsland (*Ib.*, 659).

I.

The first question presented is, what is the nature of the instrument executed by the defendant company, and we have purposely stated it is a mortgage. Upon all modern authorities the distinction between a mortgage and a deed of trust is not clearly defined, but since the modification of the legal effect of a mortgage so as not to permit it to convey the fee, it may be generally stated that a conveyance to secure the payment of a debt is a mortgage. It is further believed that a conveyance to secure a debt, with provision that on the payment of the debt the conveyance is to be void, and that the title thereupon shall revert to and revest in the grantor without any reconveyance, re-entry, or other act, was always a mortgage. The old authorities, attempting to draw the line of demarkation between a mortgage and a deed of trust, are not coherent, are unsatisfactory, and, since mortgages have been held not to be conveyances, have become of no consequence in legal terminology.

But this is a mortgage, and not a deed of trust. It recites authority of the trustees to "execute trust mortgages to secure the payment of bonds issued by it." (Rec., 8.)

It provides for the possession of the mortgaged prem-

ises to remain with the mortgagor, giving it the privilege of "mining, reducing, smelting, and selling ore from said mine," &c. (Rec., 9.)

And then, by specific words, declares the purpose and nature of the instrument as follows: "Meaning and intending hereby to 'mortgage all the property of said company.'" (Rec., 9, *et seq.*)

And then it provides that if sold the moneys shall be applied to the payment of the debt, and the residue to the mortgagor. It was not a conveyance to pay the debt, for the mortgagor, in the bonds, and again in the mortgage, undertook to pay the debt whether the property sold for enough or no. (Rec., 10.)

The paper being a mortgage, its whole intent was to secure sixty bonds, and the process by which, in case there was default in their payment, the money was to be obtained was a part of the security.

Bradley *v.* Chester Valley R. R. Co., 36 Pa. (State), 151.

"If there is a power of sale * * * it is still in effect a mortgage, though in form a deed of trust."

Shillaber *v.* Robinson, 97 U. S., 68.

If the transaction resolved itself into a security, whatever be its form, it is in equity a mortgage.

Blakemore *v.* Byrnside, 7 Arks., 509, and cases cited.

And the courts are inclined to construe contracts to be mortgages whenever their real character may be doubtful.

Folsom *v.* Fuller, 15 Arks., 284, and cases cited.

And these points are recognized by Coote Mort. (2d Am. ed.), 14–15, and see note A, containing a large list of authorities in the United States.

II.

The notice to sell, which was a condition precedent to any sale, and without which any sale is confessedly void, was not given. The notice required is specifically described in the mortgage. The language of that instrument is: "First giving thirty days' notice of the time, place, and terms of such sale by publishing the same once a week for three weeks successively."

Let us analyze the language. The last part of the language specifies the essentials of the notice which shall be given—that is, how extensively the information shall be disseminated to constitute the notice—and the first part directs when it shall be given with reference to the sale; and of the quality of the notice, it is required as a unity that it be published for three weeks. The notice is not given—the information is not disseminated—until this is done. The parties sought to be reached could not be informed within a shorter time than three weeks, and therefore this was required as the notice. No notice less than this would be a compliance with the last part of the stipulation. When this three weeks had expired, and not before, could it be said the notice was given. The last publication, the third week, was a part of the notice prescribed, without which it would be incomplete. It is not believed that this proposition can be gainsaid.

If, then, the required notice is as above stated, let us recur to the first part of the sentence and see when, with reference to the sale, that notice as a unity must have been given. Whatever notice is required must be *thirty days before the sale.* "First giving thirty days' notice," is the language, and then proceeding to define the notice which must so be given before the sale. This requirement is unlike many others, and the parties knowing that the sale would transpire three thousand miles from where the parties interested in it would be, and perhaps

that distance from the property to be sold, reserved thirty days after the notice was complete to prepare for the exigencies of the sale. It was therefore determined that the whole publication should be thirty days before the sale should proceed, and they provided for this by apt words, guarding this one proposition to the extent of being tautological, for the word "first" was not necessary to make this meaning clear, and was inserted from abundant caution.

Bussey *v.* Leavitt, 12 Me., 378.

A failure to publish for three weeks, thirty days before the sale, is as fatal as to omit it in some of the issues of the paper.

Early *v.* Doe, 16 How., 610;
Endl. Const., sec 389 (top p. 545–6).

This kind of mortgages—with power to sell—will be jealously watched by courts, and declared void for the slightest unfairness or excess.

Hilliard Mort. (2 ed.), 119 and notes; 130 and notes;
Burnet *v.* Denniston, 5 Johns, ch. 35;
Longwith *v.* Butler, 3 Gillm. (Ill.), 32.

The power to sell must be construed strictly as to time and place of sale: Adams Eq. (7 Am. ed.), 121, and note 1, cases cited. The power must be strictly complied with or the sale will be invalid. (2 Story Eq. Juris., 332 and notes.)

Shillaber *v.* Robinson, *sup.*

In the case at the bar the sale was September 2d. The third week of publication in the *Boston Traveller* expired August 5th, and third week in the *Butte Miner* August 11th, 1885, in the event that seven days are to be counted as each week. (See 16 Am. & Eng. Ency. Law., p. 817,

tit. notice, and notes, for full discussion as to notice generally, and in cases like the one at bar.)

Service by publication is deemed complete when the time prescribed for publication has expired; and the time within *which the party notified must act is computed from that date.* (16 Am. & Eng. Ency. L., 819, and notes.) So in this case only twenty-two days were left instead of thirty, as prescribed.

"In either case, the validity being wholly dependent on the power conferred by the instrument, a strict compliance with its terms is essential."

Shillaber *v.* Robinson, *sup.;*
4th Kent, 148, and notes 1 *et seq.* (13 ed.)

Where the terms of a mortgage or deed of trust require that before any foreclosure or sale under it is made, sixty days' notice shall be given in certain newspapers, a sale without the notice conveys no title.

Bigler *v.* Waller, 14 Wall., 297.

If the execution of a power be prescribed by a particular method, it implies that the mode proposed is to be followed, and it contains a negative upon every other mode.

4 Kent, 148, and notes 1 *et seq.* (13 ed.)

In respect to the execution of a power to sell contained in a mortgage, the specific directions usually contained in the mortgage will preclude all departure from those directions.

4 Kent, 148–9, *supra.*

This method, being a substitution for judicial procedure, must be followed with really more strictness than the latter, and the analogy of this kind of mortgages or proceedings to those under statutes is full and complete; but where statutes have required certain things to be

done, and there was failure even in minute details, the sales were held void.

Haskell *v.* Bartlett, 34 Cal., 281;
16 Am. & Eng. Ency. L., 818, notes *et seq.*, Tit. *Notice.*

But the notice was defective, in that it did not describe the property to be sold, which is an essential pre-requisite.

Jackson *v.* Meyers, 14 Johns, 354;
Murfree Sheriffs, secs. 669–679–1009;
16 Am. & Eng. Ency. L., *sup.*, 815–16; note 2 to p. 818.

The regularity and validity of the sale is a part of the respondent's bill and must appear.

Jackson *v.* Clark, 7 Johns, 217;
Shillaber *v.* Robinson, 97 U. S., 68 (*sup.*);
Bigler *v.* Waller, 14 Wall., 297. (*sup.*)

There is no pretense of describing or pointing out the personal property, and as to the real estate, instead of liquidating or describing the "assessments" or "taxes," or affirming that there are or are not any such, the trustees throw doubt on the title of the property they sell, and so far as the record shows, falsely throw out an intimation that there were "assessments" and "taxes" due. It was their duty to state in the notice just what they assumed to sell, and not to say, in effect, "we sell a scramble for property, and you can have what you in that scramble can get."

In other words, the notice must describe what was to be sold. In this case the parties wishing to purchase had to look not only to the advertisement, but also to the records in Silver Bow County, and to the premises and business of the mining company, to see what personal property was "owned" or "employed" by it, to know what the mortgagees were selling, and what they would

get by the purchase. Thus was competition effectually suppressed.

Hilliard, *sup.*, 119–130;
Longwith *v.* Butler, *sup* ;

and see authorities above cited on the question of invalidating mortgages of this kind for the slightest unfairness or excess, irregularity, etc.

It was the duty of the trustees, under this mortgage, to the debtor company, and to the creditors, to state with exactness what they sold. The ninth statement of facts (Rec., 18), that the property sold at 37½ per cent. of its value, shows that from some cause the parties suffered in that the property did not bring half its value. "Not only is a literal compliance necessary, but the mortgagee is bound to use reasonable diligence to protect the mortgagor's interests."

4 Kent (13 Ed.), 148, note 1 ;
Jenkins *v.* Jones, 2 Gibb., 99, 108.

The nature of the duties of a mortgagee or trustee selling depends on the wording of the power. If any discretion is given it must be exercised in good faith for the benefit of all concerned:

4 Kent, *sup.*, 148, note X¹ ;
Markey *v.* Langley, 92 U. S., 142;
Olcott *v.* Bynum, 17 Wall., 44.

III.

Pephaps another claim of the respondents might as well be here examined.

They say there is in the mortgage a power of attorney, no part of the security, under which the mortgagees acted in conveying the property after the sale to the beneficiaries of the mortgage, and to justify such action they cite Forgarty *v.* Sawyer, 17 Cal., 589.

As to this case, it will be seen it does not sustain the

respondent's title or claim. There was no defeasance in the instrument in that case, and the power was executed in the name of the principal or grantee, and not in the name of the mortgagee or trustee. If we shall say that here are two instruments in one—a mortgage and a power of attorney—the mortgage has no attributes or legal effect but those of a mortgage and the power of attorney were it in a separate instrument. It being a suit to recover possession, the title or right of possession must be in the respondent or they cannot recover; but a conveyance to secure a debt does not convey the title or right of possession, but only a chattel interest until foreclosure, and so until foreclosure the title remains in the Bell Mining Company. Respondents have no deed from the company conveying title to them, either by the company itself or by Tyndale & Wells, as attorneys. In fact, they assume to act for themselves—not in the name of their principal.

It may be said this is a technical objection, but it is only apparently technical. It is substantial and fatal to respondent's recovery.

Clarke, Lessee, *v.* Courtney, 5 Pet., 318.

In this case, dealing with this precise question, the court, answering the suggestion that it is technical, says: "The law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity." (P. 349.) No decision not under statutes like Montana's is controlling, and the case in 17th Cal. does not seem well considered.

It is believed that these objections are insuperable, and that they show appellees can not recover.

IV.

We are next brought to the main question in this case, which is, if all the foregoing recited acts of the mortgagees had accorded with the authority given in the manner re-

quired by law, under the statutes of Montana, can appellees recover except by a proceeding in court after a decree rendered and a sale thereunder?

To this question the appellants answer no. As to lands in Montana and contracts affecting them, the legislative authority is, as we have seen, supreme. The whole instrument executed to Wells & Tyndale was given to secure the payment of the bonds mentioned, and it is a mortgage. It would not be useful to recite the technical meaning of the words of a mortgage, or detail their actual legal effect. It is not necessary to recite the great judicial controversy between the chancellors and the common-law lawyers as to the remedies which were vested in mortgagees, nor is it imperative that we trace this controversy transferred from the home and fountain of our law, equitable and common, to this country to show, by a consensus of opinion, finding expression sometimes in statutes, but more frequently in judicial decisions, the phrases of a mortgage have been interpreted and changed until phraseology has been made to bow to fact, until its words have been eviscerated and emasculated, so that they are now made to conform to those purposes which human experience, from all sources, has taught is the true purpose of a mortgage, viz., security.

It had been better, doubtless, if this had been done by legislative action, rather than judicial decision, but lawyers know the needs of a people in matters contractual before statesmen find them out, and Hardwicke and Mansfield, in England, and Kent and many others in this country, took a hand in this contest before legislative authority came to their relief.

We can not come to this decision intelligently without a consciousness that this has been one of the greatest controversies our common law has known. In Montana, and in most of the jurisdictions of this country, that controversy is ended. Equity and law alike have pierced

through all verbal subterfuges which ingenuity and avarice can invent, and hold the title to remain in the mortgagor, and has thrown around that title, before it can be divested, the panoply of a judicial determination, open to any contention the parties desire to make.

"There shall be but one action for the recovery of any debt or the enforcement of any rights secured by mortgage upon real estate or personal property, which action shall be in accordance with the provisions of this chapter."

Montana Com. Stat., sec. 358, p. 158 (Ed. 1887).

"A mortgage of real property shall not be deemed a conveyance whatever its term(s), so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale."

Montana Com. Stat., *sup.*, sec. 371, p. 61.

Whatever ingenuity of speech may be woven into a security for a debt on real estate, you must face a court of equity and have a public sale by its direction, is the legislative command.

In Woodruff *v.* Robb, 19 Ohio, 212, the court says: "The deed now in question contained all the substantial qualities of a mortgage, and nothing more. It was a mere security for a debt to be void if the debt were paid. The fact that the conveyance was made to a person other than the creditor, and that it contained a power to sell, does not alter its character in this particular." (See also Shillaber *v.* Robinson, *sup.*) But in neither of the jurisdictions to which these decisions relate was there any equivalent to the section of the code referred to.

(1) Once the remedy on a conveyance, void except on performing conditions, was ejectment, which the grantee could have before breach of the conditions.

(2) Next, the same remedy was denied before breach, but given after breach, and the grantor could not thereafter perform the condition and recover the estate.

(3) Then courts permitted him to comply after time fixed for compliance on payment of damages being where it was payment of money, certain damages known as interest.

(4) Later, strict foreclosure was permitted, wherein it was adjudged that there had been a breach, and that the conveyance, by reason thereof, had become absolute.

(5) Later still, the courts refused to decree title in the grantee, but permitted the property to be sold, and after paying the grantee his money and damages for lack of promptness, interest, decreed the residue to grantor.

These last modifications, all by the courts, did violence to the letter of the deed, but were made in deference to the rights of the parties, for "the letter killeth, but the spirit giveth life." These decisions made the transition to the principles embodied in the Montana statute, which are far in advance of such legislation on this subject, easy. Appellees have sought to evade the force of the statute by denying that this instrument, as affecting the land, is a mortgage, and calling it a deed of trust. This is in the face of the avowed purpose of the parties to the instrument, who declare in it in terms that it is designed as a mortgage. Some authorities have sought to make the line of distinction between a mortgage and a deed of trust turn on the fact whether the grantee was a creditor or some third person. On principle, this can not be maintained. The grantee, who is the creditor, holds his title on a specific trust to pay himself the debt and return the surplus to the grantor, no less than does the grantee, who is not the creditor, and so the highest courts in Montana

(Fee *v.* Swingley, 6 Mont., 596,) and of the United States (Teal *v.* Walker, 111 U. S., 242,) have held, that a deed to a grantee to secure a debt to a third person is a mortgage. Calling it a deed of trust does not make it such (Heryford *v.* Davis, 102 U. S., 235); if it were a deed of trust to secure a debt, its essential nature would not be changed, but the title would remain in the grantor.

Shillaber *v.* Robinson, 97 U. S., 68, *supra.*

In Wheeler *v.* Sexton, 34 Fed. R., 154, Mr. Justice Brewer, following the decisions in Nebraska without any statute, held a sale of this kind invalid, but here we have an express statute in Montana, and decisions there upholding the statute. (*6 Mont., supra.*)

If so much of the instrument as in form is a grant to secure a debt is by the law inoperative to pass the title to the grantee, that title remains in the grantor, and the conveyance by the grantees assuming in their own names to convey the title to the appellees was a nullity.

They have not assumed in the name of the grantor to make any conveyance whatever, and hence the title and consequent right of possession remains in the appellant.

By their pretended sale Wells and Tyndale assigned the mortgage simply, and their action has no other significance.

Brobst *v.* Brock, 10 Wall., 534;

Wakeman *v.* Hazleton, 3 Barb., ch. R., 148.

It was formerly true, with reference to ordinary mortgages, that the mortgagee had power to sell after a condition was broken, and thereby convey the title to the grantee.

This authority can hardly be called an implied authority. It grew out of the estate vested in him by the grant or deed. But if it were an implied authority, if it existed, it would be as complete when implied as it is when expressed; and if this authority in the progress of

equitable interpretation has been destroyed where it grows out of the estate or is implied, it has been destroyed when it is expressed.

The statute "cuts up by the roots" the estate or title of the mortgagee, and remits him to his chose in action and a suit thereon. The State of New York has no statute declaring that title should not pass to the grantee, and in the absence of such a statute the reasoning of the Supreme Court in Shillaber *v.* Robinson, *sup.*, does not apply.

The pivotal fact of that decision hinges on the possible transfer of the fee by way of mortgage, which in Montana is forbidden. The sale being part of appellee's title, it must be such as courts will sustain, and any marked undervaluation in the price paid will vitiate the sale.

Peugh *v.* Davis, 96 U. S., 337.

It must be shown that the conduct was full, frank, and fair, and that property brought what it was worth to extinguish the equity of redemption.

Villa *v.* Rodriquez, 12 Wall., 339.

The very fact that this property sold for but little over one-third of its value throws a doubt and suspicion on this transaction that, unexplained, renders it nugatory. The inadequacy of consideration is unconscionable and shocks all sense of justice.

It may not be out of place here to remark, that the laws territorial, and decisions thereon by courts territorial, form no rule binding upon this court, and come not under § 721, R. S., on this subject; that section applying alone to *States* proper. (*Gould & Tucker, notes R. S., pp. 193 et seq; Ib, p. 460.*) Only in matters of practice under the codes of the Territories are the decisions of those courts conclusive on this court.

Sweeny *v.* Somme, 22 Wall., 208;
McAllister *v.* Kuhn, 96 U. S., 87.

Therefore, the construction placed upon the territorial law of Montana in this case, by territorial courts thereof, is not of itself a decision to conclude this court.

The district court of the Territory of Montana erred in finding and in rendering judgment for appellees on the agreed statement of facts (Rec., 7–12), and the Supreme Court of that Territory erred likewise in affirming that finding and judgment, as the finding and judgment should have been for these appellants; and for this error, which is here assigned, appellants pray a reversal of such finding and judgment.

Respectfully submitted.

W. F. SANDERS,
A. H. GARLAND,
For Appellants.

[illegible]

Term No. 164—[illegible]

BELL, SILVER and [illegible]
ET AL., [illegible]

THE FIRST NATIONAL [illegible]

IN ERROR TO AND APPEAL FROM THE [illegible]
THE TERRITORY OF [illegible]

[illegible]

[illegible]

Counsel for [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

Term No. 154—Record Case No. 14,625.

BELL SILVER AND COPPER MINING COMPANY ET AL., PLAINTIFFS IN ERROR AND APPELLANTS.

vs.

THE FIRST NATIONAL BANK OF BUTTE ET AL.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR DEFENDANTS IN ERROR AND APPELLEES.

STATEMENT OF CASE.

The action is ejectment, commenced April 1st, 1886, in the District Court of Silver Bow county, Montana, to recover possession of the Bell lode min-

ing claim, in said county. Defendants in error (plaintiffs below) claim title through a sale by trustees under a power contained in a trust deed or mortgage, made by the Bell Company to secure certain bonds, and which trust deed or mortgage is set out in full in the record (pages 8 to 12, findings of fact).

Plaintiffs in error deny that this sale transferred any title. The facts in the case were agreed upon by the parties (record ps. 7 to 19), except the value of the property, which was found by the Court (ninth finding, record p. 18) and inserted as agreed to. The case was tried by the Court upon these facts and judgment rendered for the defendants in error July 9th, 1887. Plaintiff in error appealed to the Supreme Court of the Territory of Montana and that Court affirmed the judgment of the Court below September 15th, 1888, (8 Montana, 32). The case comes here upon appeal from and writ of error to the Supreme Court of Montana.

BRIEF OF ARGUMENT.

I.

It should be kept in mind in this case that no issue is made as to the validity or regularity of the mortgage indebtedness, or as to the authorized and sufficient execution of the mortgage itself. No charge of fraud or unfairness is made in the answer and no equitable relief is sought. Plaintiffs in error do not ask to have the sale set aside or to redeem from

it. Therefore fraud in fact or mere irregularities in the sale are waived.

Markey vs. Langley, 92 U. S. 153.

The only question is, did the trustees' sale, under the deed of trust or trust mortgage, as made, convey title ?

II.

The instrument under consideration is what is usually called a deed of trust.

Taylor vs. Stearns et al., 18 Grattan 376-9.
Sherwood vs. Saxton, 63 Mo. 78.
Koch vs. Briggs, 14 Cal. 256.
Grant vs. Burr, 54 Cal. 298.
Jones on Mortgages, Sec. 62, Secs. 1769–1771.

1 Perry Trusts &c 328-9

The construction of a contract is for the Court and a matter of law.

Parsons on Contracts, 2 Vol. 492.
Heryford vs. Davis, 102 U. S. 243–4.

It is certain that the grantees were trustees and they acted for both parties. The conveyance was made to them as trustees and in that capacity they acted.

It does not make much difference in this case whether the instrument is called a trust deed or a trust deed in the nature of a mortgage.

III.

As to the notice of sale, it was sufficient if thirty days or more intervened between the first publication and the day of sale.

75 American Decisions 708–9, note.
Leffler vs. Armstrong, 4 Iowa, 482.
2 Jones on Mortgages, Sec. 1838.
2 Perry 602 n.

As to notice, all that is necessary is that the contract or power be complied with.

Wade on Notice, Sec. 1133.

The case cited by plaintiffs in error from 12 Maine, 378, is not in point.

It is claimed that the notice did not sufficiently describe the property to be sold. The description in the notice is the same as in the trust deed; and, besides, this action does not relate to the personal property sold.

Jones on Mortgages, Sec. 1840.
See also
Loveland vs. Clark, 11 Colorado, 265.

So it is objected that the property was sold subject to all outstanding taxes and assessments, if any, unpaid.

This, if it had any effect, would be a mere irregularity and would not avoid the sale. Appellants cite no authority on this point.

And suppose no such statement had been made in the notice of sale, would not the sale in law still have been subject to assessment and taxes upon the property? Taxes under the laws of Montana are a lien from the time they are assessed, upon the property.

IV.

What the defendants in error claim is that there is in the mortgage or trust deed a power of sale given to the mortgagees or trustees. This power of sale is something more than a mere power of attorney.

Jones on Mortgages, Sec. 1792. 1773
Bradley vs. The Chester Valley R. R. Co., 36 Pa. 151.
Strothers vs. Law, 54 Ill. 413.
Collins vs. Hopkins, administrator, 7 Iowa, 463.
Calloway et al. vs. The People's Bank of Bellefontaine et al. 54 Georgia 441.

It should be observed that at least in Iowa and Georgia the rights of the mortgagee are treated only as a mere security. In the case of Calloway et al. vs. The People's Bank of Bellefontaine et al., 54 Georgia, 447, the Court says "that in that state no title, no estate are conveyed by a mortgage." In the case of Fanning vs. Kerr, 7 Iowa, 460, the Court recites that the Code of Iowa provides in Section 1210 "that in the absence of stipulations to the contrary the mortgagor of real estate retains the legal title and right of possession thereof."

Another point in which such a power is different from an ordinary power of attorney is that it passes with the assignment of the debt secured by the mortgage the same as the mortgage and is considered a part of the security.

Jones on Mortgages, Secs. 1785, 1786, 1787 and 826.
Bradley vs. The Chester Valley R. R. Co., 36 Pa. 151.
2 Perry 602 h.

Again: The exercise of such a power of sale as is found in the mortgage under consideration is considered a sort of a foreclosure of the mortgage provided by the parties themselves.

Blackwell vs Barnett, ~~42~~ 52 Texas, 333.
Jones on Mortgages, Secs. 953 and 1773.
2 Perry 602 gg.

Such a power as this is executed in the name of the mortgagee or donee of the power and not in the name of the mortgagor.

2 Wash. on Real Property, 5 ed. 719, Marg. p. 324.
Wilson vs. Troup, 2 Cow. 195-239.
Strothers vs. Law, 54 Ill. 413.
4 Kent's Com., 160 Mag. p. 147.
John Munn et al. vs. Burges et al., 70 Ill., 604-612.
Bergen vs Bennett, 2 Am. Dec. 281.
Hall vs. Bliss, 118 Mass., 554-9.
Cranston vs. Crane, 97 Mass., 459.
2 Perry 602 f. 602 bb

The power should always be executed according to its terms. If it is provided that it shall be

executed in the name of the mortgagor or donor, it must be so executed. If in the name of the mortgagee or trustee or donee, then in his name.

Jones on Mortgages, Sec. 1778.
Fogerty vs. Sawyer, 17 Cal. 589.
Cranston vs. Crane, 97 Mass. 459.
2 Perry 602-9.

The provisions in regard to the power of sale in the mortgage or trust deed under consideration were sufficient to authorize the sale in the names of the mortgagees.

Jones on Mortgages, Sec. 1789. 1778-9
Munn et al. vs. Burges et al., 70 Ill. 604.
Cranston vs. Crane, 97 Mass. 459.

The only possible objection which can be urged against the mortgagees or trustees executing the power in their own names is that, considering this as a mortgage, under the statutes of Montana a mortgage is a mere security and the mortgagees have no estate or title in the property. But the mortgagees do hold a lien upon the property. It is conveyed to them as a security and the power is coupled with this security or lien, and by virtue of the power a grantee of the estate is appointed.

For many years this class of powers, executed as this one was, have been held valid. In equity all of this time the right in the property conveyed held by the mortgagee was considered only a security. In equity these powers have been held good. There

can be no different rule now in equity. Because the rule as to a mortgage has become the same at law as it has been in equity for years, should these powers now be discarded at law while they are good in equity? There is no reason for the Courts taking this position.

V.

Could the Bell Company deed of trust or mortgage, or whatever it may be called, be foreclosed by sale by the trustees, or was the agreement to that effect in the instrument contrary to the statutes of Montana and void?

While we claim that the instrument was in legal effect a trust deed, we will treat it in considering this point as either a trust deed or a mortgage with power of sale. For we claim that the distinction is not material so far as the present question is concerned.

If the power of sale granted was legal and was executed according to the terms of the instrument, the trustee's deed conveyed the title and cut off all equity of redemption. All the authorities are to this effect. Such instruments as the one here in question are common everywhere as securities.

Koch vs. Briggs, 14 Cal. 256.
2 Wash on Real Property, Secs. 67-81.
2 Jones on Mortgages, Secs. 1764-1767.
Shillaber vs. Robinson, 97 U. S. 77.

There can be no doubt of the validity of the

power of sale here in question, unless the statutes of Montana prohibit the exercise of such a power. Whether they do or not is the important and really the only question to be determined by the Court in this case.

The provisions of the statutes of Montana bearing upon this question are Sections 371 and 358 of the Code of Civil Procedure, Compiled Statutes of 1887, which are the same as Sections 309 and 295, Civil Practice Act, Codified Statutes of 1871-2. These sections are now in force in Montana and have been since 1869, when the Legislature of Montana adopted almost literally the California Civil Practice Act, including the above two sections.

These sections, so far as material to be considered here, are as follows (Code C. P., Comp. Stats. Montana of 1887):

"Sec. 371. A mortgage of real property shall "not be deemed a conveyance, whatever its term, so "as to enable the owner of the mortgage to recover "possession of the real property without foreclosure "and sale."

"Sec. 358. There shall be but one action for the "recovery of any debt or the enforcement of any "rights secured by mortgage upon real estate or per- "sonal property, which action shall be in accordance "with the provisions of this chapter. ....."

By reason of these two sections, plaintiffs in error claim that the sale in this case under the power

in the mortgage was void and conveyed no title.

Let us consider this section 371 first, without reference to the authorities, but as to its language and evident intention.

1st. It relates only to the *possession* of mortgaged property, evidently intending to do away with the common law right of the mortgagee to possession.

2d. It relates only to *mortgages*, and not to any other form of security.

3d. It prohibits possession by the mortgagee without foreclosure and sale.

Plaintiff in error's construction of this section in effect adds to it, after the words "without foreclosure and sale," the words "by action as provided in section 358 of this act." This addition is unauthorized.

There are various modes by which, in the absence of statutes forbidding them, a mortgage may be foreclosed, as:

1st. By entry and possession by the mortgagee.

2d. By action or by suit in equity.

3d. By sale under a power given by the mortgage.

Under section 371 there must be a foreclosure

and sale, but the section does not provide that this must be by action under section 358. See

Shillaber vs. Robinson, 97 U. S. 77-78.

Section 358 does not say that the mortgagee shall have but one remedy or one right. It only provides that when he comes into court for relief, there shall be but one action.

It does not say that the parties may not agree to any other mode of foreclosure and sale than by action under section 358.

If there is a foreclosure and sale, whether under section 358 by action or under a power given by the mortgage, section 371 is satisfied.

Under our Code of Civil Procedure, there are many instances where only one action is provided, but this does not preclude other remedies by act or agreement of the parties.

See Bryant vs. Carson L. Co., 3 Nev. 313.
Wilson vs. Brannon, 27 Cal. 258.

These sections, 371 and 358, are identical with the sections in the California Practice Act, and this Practice Act with these sections, was adopted in Montana in 1869.

Before that time (and ever since) the California courts had construed these sections :

In Koch vs. Briggs, 14 Cal. 256, section 371 was held not to prohibit sales under deeds of trust.

In Fogarty vs. Sawyer, 17 Cal. 590, a power of sale in a mortgage was held good and not prohibited by section 371. This last case was decided in 1861 by Mr. Justice Field. His opinion is clear, direct and unanswerable.

In Cormerais vs. Genella, 22 Cal. 116, Fogarty vs. Sawyer is followed upon this point.

The same case of Fogarty vs. Sawyer came up again in 23 Cal. 570, and was again decided as in 17 Cal.

The doctrine of Koch vs Briggs and of Fogarty vs. Sawyer has been followed and approved by the Supreme Court of California in

Grant vs. Burr., 54 Cal. 298.
Bateman vs. Burr, 57 *id.* 480.
Durkin vs. Burr, 60 *id.* 360.
60 Cal 445. 66 Cal 286-7

The Civil Code of California providing for powers of sale in mortgages was not adopted until 1872 or 1873.

When in 1869, the legislature of Montana adopted the Civil Practice Act of California, almost bodily, including sections 371 and 358 above referred to, *verbatim*, it adopted with those sections the judicial constructions theretofore put upon them by the Supreme Court of California, as shown by the foregoing cases.

This is the general rule as to all statutes of one State adopted by another; and, aside from the case at bar, has been applied by the Supreme Court of Montana, both while it was a Territory and since it became a State, in many instances

Territory vs. Stears, 2 Montana, 330.
Hershfield vs. Aiken, 3 *id.*, 449.
Lindley vs. Davis, 6 *id.*, 453.
Price vs. Lush, 10 *id.*, 61 and authorities cited.

And the same rule has been emphatically approved by this Court in Metropolitan R. Co. vs. Moore, 121 U. S., 558, to which case attention is particularly called, as it seems practically conclusive of the case at bar.

That a statutory provision for foreclosure of mortgages by action does not prevent foreclosure under a power of sale by agreement of the parties, the following cases, in addition to the California cases above cited, are direct authorities:

Carson vs. Blakely, 6 Missouri, 273.
Fanning vs. Kerr, 7 Iowa, 450.
Collins vs. Hopkins, 7 Iowa, 463.
Morrison vs. Bean, 15 Texas, 267.
Blackwell vs. Barnett, 52 Texas, 326.
Sampson & Keene vs. Williams, 6 Tex., 102.

And the case of Leffler vs. Armstrong, 4 Iowa, 482, also bears upon the question.

In Shillaber vs. Robinson, 97 U. S., 68 (cited by

plaintiffs in error), what was held was that the notice of sale did not comply either with the requirements of the statute, or the terms of the mortgage.

Plaintiffs in error also cite Teal vs. Walker, 111 U. S., 242.

This case was to recover rents and profits by virtue of a provision in the mortgage for possession by the mortgagee. It arose under the Oregon statute. There had been no foreclosure or sale, either by action or under any power of sale. The question did not arise, and the Court did not decide that, if a sale had been made under a power, the mortgagee or purchaser would not have been entitled to possession. Besides, the Oregon statute is materially different from the California and Montana statute. It adds to that statute the words "according to law," so as to make it read that the mortgagee cannot recover possession "without a foreclosure and sale according to law."

These last words make a material difference. "According to law" must mean in the way provided by law—that is, by action only if no other way is provided. But these words are not in the California and Montana statute, and their omission must be presumed to have been intentional and for some reason.

The case of Teal vs. Walker was no doubt decided rightly upon the facts, and under the Oregon statute; but it does not cover the case at bar. For

instance, in the case at bar there is a provision in the instrument that upon default in payment the trustees might enter and take possession of the mortgaged property. If the trustees had, before any foreclosure or sale, attempted to take possession under this provision, their act would have come directly within the decision in Teal vs. Walker, and would have been unauthorized. But the trustees did not attempt to do this. They foreclosed and sold according to the terms of the power, and then, and not until then, claimed possession. Teal vs. Walker does not hold that this could not be done. No point as to whether even the Oregon statute prohibits a sale under a power was raised or decided in the case. If it had been, is it probable that no mention would be made of it, or that Mr. Justice Field would not have commented upon the case, which then would have seemed to conflict with his opinions in the California Supreme Court cases?

Fee vs. Swingley, 6 Montana, 596, has no application to the case at bar as was held by the Supreme Court of Montana in its opinion in this case.

In Fee vs. Swingley the Court held the instrument in question to be a mortgage, and that under section 371 (359) no deed the trustees might make would entitle the defendant to possession without a foreclosure and sale. It also held that the mortgagee might hold possession by consent of the mortgagor, given after the mortgage was made. In that case,